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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1930

No. 115

W. P. BROWN & SONS LUMBER COMPANY,
PETITIONER,

vs.

COMMISSIONER OF INTERNAL REVENUE

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR CERTIORARI FILED MAY 14, 1930

CERTIORARI GRANTED JUNE 2, 1930

(35,026)

(35,026)

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[fol. 1]

BEFORE UNITED STATES BOARD OF TAX APPEALS

Docket No. 9218

W. P. Brown & Sons Lumber Company, Brown Brothers Land & Lumber Company, Louisville, Ky., Petitioner,

vs.

Commissioner of Internal Revenue, Respondent

Appearances

For Taxpayer: W. W. Spalding, Esq., for Comm's: M. E. McDowell, Esq., F. B. Slosser, Esq.

Docket Entries

1925

Nov. 18. Petition received and filed.
" 20. Copy of petition served on Solicitor.
" 20. Notification of receipt mailed taxpayer.

1926

Jan. 16. Answer filed by Solicitor.
" 19. Copy of answer served on taxpayer. Assigned to General Calendar.
Sept. 22. Motion to be placed on hearing not earlier than 2/15/27 filed by taxpayer.

1927

Jan. 14. Hearing date set 3/3/27.
" 17. Application for order to take depositions of J. C. Doyle et al. filed by taxpayer.
" 17. Application for order to take depositions of P. Joyes & E. R. Clark filed by taxpayer.
" 20. Order to take depositions of Preston Joyce et al. (2) signed & filed. Both sides notified.
Feb. 9. Depositions of Preston P. Joyce, et al. filed.
" 10. Depositions of J. C. Doyle, et al. filed.
" 11. Copy of deposition served on G. C.
" 19. Motion to place on Reserve Calendar filed by taxpayer.

Feb. 10 Copy of deposition served on G. C.
" 21. Motion of 2/19/27 granted. Both sides notified.
May 19. Motion to amend filed by taxpayer. Amended petition tendered.

[fol. 2]

May. 21. Motion of 5/19/27 granted. Both sides notified.
" 24. Copy of motion and amended petition served on G. C.
June 28. Answer to amendment to petition filed by G. C. Copy served 7/1/27.
July 7. Motion to restore to Gen. Cal. for hearing upon the merits filed by G. C.
" 11. Granted. Both sides notified.
Dec. 6. Hearing date set 1/10/28.
" 23. Motion to postpone until April term filed by taxpayer.

1928
Jan. 4. Motion granted to 4/16/28.
Apr. 16. Hearing had before Mr. Love. Continued 10 days. Order of con. to 4/26/28 entered.
" 26. Hearing had before Mr. Sternhagen. Submitted. Petitioners brief due 5/28/28. Stipulation of deficiency filed.
May 2. Transcript of hearing of April 26, 1928 filed.
" 21. Brief filed by taxpayer.
Jul. 25. Memorandum opinion rendered by Sternhagen. Parties agreed to file proposed redetermination, entered.
Aug. 4. Stipulation and form of order filed.
" 10. Judgment redetermining deficiency, entered.
1929
Jan. 28. Supersedeas bond for $17,000.24 approved & ordered filed.
" 28. Petition for review by U. S. Cir. Ct. of Ap. (6) with assignments of error & proof of service filed by taxpayer.
" 29. Præcipe with proof of service thereon filed.
Feb. 12. Objections to præcipe filed by G. C.
" 25. Agreed statement lodged.
" 27. Agreed statement approved & ordered filed.

Now, March 1, 1929, the foregoing Docket Entries certified from the record as a true copy.

B. D. Gamble, Clerk, U. S. Board of Tax Appeals.
(Seal.)

[fol. 3] BEFORE U. S. BOARD OF TAX APPEALS

PETITION—Filed Nov. 18, 1925

The above named taxpayers hereby appeal from the determination of the Commissioner of Internal Revenue set forth in his deficiency letter (IT:CR:G-1-IK) dated October 28, 1925, and as the basis of their appeal set forth the following:

1. The parent corporation taxpayer, W. P. Brown & Sons Lumber Company, is a Kentucky corporation and the subsidiary corporation taxpayer, Brown Brothers Land & Lumber Company, is a Tennessee corporation, the principal office of both corporations being at Louisville, Kentucky. The Bureau of Internal Revenue has ruled that the taxpayers, W. P. Brown & Sons Lumber Company (herein referred to as the parent corporation) and Brown Brothers Land & Lumber Company (herein referred to as the subsidiary corporation) are affiliated corporations within the meaning of the Revenue Act.

2. The deficiency letter (a copy of which is attached) was mailed to the taxpayer, W. P. Brown & Sons Lumber Company, on October 28, 1925.

3. The taxes in controversy are income and profits taxes for the calendar year 1917, and are more than $10,000 to wit: $31,184.47.

4. The determination of tax contained in the said deficiency letter is based upon the following errors:
The Commissioner erred:

(a) In reducing the consolidated invested capital by $115,584.14; and

(b) In fixing the March 1, 1913, value of stumpage owned at that date by the subsidiary, Brown Brothers Land & Lumber Company, for depletion purposes, at $3.00 per

thousand feet, resulting in the disallowance of depletion for 1917 of $48,184.52.

5. The facts upon which the taxpayers rely as the basis of their appeals are as follows:

On March 1, 1913, the subsidiary herein, Brown Brothers Land & Lumber Company, owned what is known as the Robe Lake timber tract, consisting of 12,336 acres of land having thereon approximately 64,000,000 feet of standing merchantable timber and 8,500,000 bolts, all of which was acquired by purchase in 1911. This tract of land is located near Brasfield, Arkansas.

The subsidiary company did not begin operating and had no income until the year 1917. Consequently, the original cost of the timber land acquired in 1911, plus the carrying charges and other expenditures which were properly capitalized up to January 1, 1917, amounted to $326,584.14, which is the cost of the property (Robe Lake timber tract) [fol. 4] for invested capital purposes. The Commissioner has erroneously reduced the cost of this property to $211,000.00, thereby reducing the invested capital by $115,584.14.

The Commissioner has also alleged that the cost of the aforementioned property and its value as of March 1, 1913, were the same and has allowed depletion at the rate of $3.00 per thousand feet on the timber consumed in operations in 1917. The fair market value at March 1, 1913, of the timber contained in the said Robe Lake tract, consisting of approximately 64,000,000 feet, plus subsequent costs properly capitalized, were not less than $561,280.00. The footage cut in 1917 was 8,345,000 feet, the fair market value of which on March 1, 1913, plus such subsequent capitalized costs were not less than $73,219.52, which amount should be allowed as a deduction for depletion in 1917. The Commissioner has allowed only $25,035.00.

Under date of March 6, 1923, the Bureau of Internal Revenue addressed a letter to the parent taxpayer, W. P. Brown & Sons Lumber Company, advising it of a deficiency in taxes for 1917 of the following amounts:

W. P. Brown & Sons Lumber Company	$38,035.46
Brown Brothers Land & Lumber Co.	15,831.49
A total deficiency of	$53,866.95

In the said letter taxpayers were advised that in accordance with the provisions of Section 250 (d) of the Revenue Act of 1921, they would be granted thirty days within which to file an appeal. Within thirty days from the date of said letter taxpayers filed their appeal to the Commissioner of Internal Revenue, to-wit, on April 2, 1923, protesting the findings of the Commissioner as disclosed in his letter of March 6, 1923. Before the expiration of the thirty day period from March 6, 1923, the Commissioner made jeopardy assessments of the entire amount of additional taxes ($53,866.95) stated above, and these taxpayers thereupon filed abatement claims for the total amount so assessed, which were accepted by the Collector. The abatement claims and the appeal of the taxpayers were sent by the Income Tax Unit to the Committee on Appeals and Review under date of June 4, 1924, and the decision thereon by the Commissioner is evidenced by the letter of October 28, 1925, copy of which is attached. This letter evidences the final determination by the Commissioner of the 1917 deficiency.

[fol. 5] 6. The taxpayers, in support of their appeal, rely upon the following propositions of law:

That the taxpayers are entitled to include in their consolidated invested capital the cost of said assets; that they are also entitled to a deduction for depletion, based upon the fair market value of the timber at March 1, 1913; and that the Commissioner erred, as a matter of law, in reducing the invested capital below actual cost and in fixing the March 1, 1913, value of the timber at an amount less than its fair market value on that date.

Wherefore, the taxpayers respectfully pray that this Board may hear and determine their appeal.

W. W. Spalding, Counsel for Taxpayers, Woodward Building, Washington, D. C.

Duly sworn to by Preston P. Joyes. Jurat omitted in printing.

EXHIBIT TO PETITION

Copy

Mailed October 28, 1925.

IT:CR:G-1; IK

W. P. Brown & Sons Lumber Company, 1522 South 6th Street, Louisville, Kentucky.

SIRS: A reexamination of your income and excess profits tax returns for the year 1917 discloses over-assessments [fol. 6] aggregating $22,682.48, as shown in the attached statements and accompanying schedules.

The overassessments shown herein will be made the subject of Certificates of Overassessment which will reach you in due course through the office of the Collector of Internal Revenue for your district and will be applied by that official in accordance with Section 281 (a) of the Revenue Act of 1924.

Payment should not be made on the rejected portions of your claims in abatement until a bill is received from the Collector of Internal Revenue for your district and payment should then be made to him.

Respectfully, (S.) C. R. Nash, Assistant to the Commissioner, by (S.) H. D. Robinson, Head of Division.

dp-5.

Schedule 1

IT: CR: G-1; IK.

Summary of Returns Examined and Resulting Tax Liability. Returns Examined

Company	Year	Form	Date filed
W. P. Brown & Sons Lumber Company (Partnership)	1917	1065-1102	April 1, 1918
Brown Bros. Land & Lumber Co., Memphis, Tenn.	1917	1031-1103	April 1, 1918
N. L. Horrall Lumber Co., Indianapolis, Ind.	1917	1031	April 1, 1918

Tax Liability

Company	Year	Overassessment
W. P. Brown & Sons Lumber Company	1917	$18,533.75
Brown Bros. Land & Lumber Company	1917	4,148.73
Total		$22,682.48

The decisions arrived at in conference held in this office November 22, 1923 as a result of your protest of office letter [fol. 7] dated March 5, 1923, have been made the basis of the adjustments shown herein.

In the determination of the corrected tax liability due consideration has been given to the statements made in connection with your claims filed as follows:

Company	Year
W. P. Brown & Sons Lbr. Co.	1917
Brown Bros. Land & Lbr. Co.	1917

Claim	Date filed	Amount
Abatement	Mar. 27, 1923	$38,035.46
"	June 1, 1923	15,831.49

Waivers which will expire December 10, 1925, are on file for the year 1917.

Inasmuch as all assessments of your tax were made prior to the enactment of the Revenue Act of 1924, and as the adjustments herein set forth do not result in a deficiency as defined in Section 273 thereof, the findings hereunder may not form the basis of an appeal to the United States Board of Tax Appeals.

W. P. Brown & Sons Lumber Company. Year ended December 31, 1917.

Schedule 2

Net Income

Net income as disclosed by office letter dated March 5, 1923	$207,447.76
As corrected	159,114.19
Deductions	48,333.57

Deductions:

(a) T. M. Brown's Personal Account	$6,229.30	
(b) J. G. Brown Personal Account	6,766.51	
(c) Miscellaneous Expenses	1,900.00	
(d) Donations	2,893.86	
(e) Depreciation	30,543.90	
Total deductions		$48,333.57

Explanation of Items Changed

(a) (b) (c) and (d) These items previously disallowed are now allowed on the basis of decisions reached at a con- [fol. 8] ference held in this office November 2, 1923.

(e) The depreciation is recomputed on the basis of the rates agreed upon with respect to the Brashfield Logging Equipment and Brasfield Saw Mill. The amounts claimed with respect to the remaining items of plant and equipment as outlined in your appeal dated November 7, 1923, are allowed as claimed.

Depreciation claimed in your brief			$46,177.70
Adjustment of Steel Rails:			
Depreciation claimed:			
Cost	$7,000.00	$700.00	
Salvage 50%	3,500.00		
Depreciable at 10%	$3,500.00	350.00	
Depreciation on Steel rails disallowed			$350.00
Depreciation allowable			$45,827.70
Depreciation allowed in letter dated March 5, 1923			15,283.80
Depreciation, additional			$30,543.90

Brown Brothers Land & Lumber Company. Year ended Dec. 31, 1917.

Schedule 3

Net Income

Net income as disclosed by office letter dated March 5, 1923	$49,515.71
As corrected	43,899.07
Deduction Levee tax	5,526.64

Explanation of Items Changed

(a) Levee taxes are allowed in accordance with the decision made in conference after consideration of the certificate from the Secretary of the White River Levee District showing the percentage of expenditures by that district on account of interest and maintenance to have been eighty-eight percent.

Levee tax previously disallowed	$6,280.27
Proportion unallowable as deduction from income 12% of above	753.63
Amount allowance	$5,526.64

[fol. 9] Schedule 4

Consolidated Net Income—1917

Net income as corrected:		
W. P. Brown & Sons Lumber Company Schedule 2	$159,114.19	
Brown Bros. Land & Lumber Company, Schedule 3	43,989.07	
Total		$203,103.26
Net loss as corrected: N. L. Horrall Lumber Co. (reported)		2,748.09
Consolidated net income for excess profits tax purposes		$200,355.17

W. P. Brown & Sons Lumber Company. Year ended December 31, 1917.

Schedule 5

Invested Capital

Invested capital disclosed by office letter dated March 5, 1923	$696,017.42
As corrected	612,017.42
Reduction January 1, 1914 value	84,000.00

Explanation of Items Changed

After careful consideration of your protest with respect to the March 1, 1913 value and depletion of timberlands, the Bureau has arrived at the following value, which is also applicable to the computation with respect to your January 1, 1914 value for the reason that the original issue of stock of the Robe Lake Lumber Company in 1911, of which your company is a continuation, was in payment of this property. Inasmuch as the depletion rate is not changed from that previously allowed, and because the difference in value arrived at in this computation is in the reduction in the estimate of available footage at the basic date, the difference in value is eliminated from invested capital. Subsequent depletion sustained does not affect the result.

[fol. 10] Value previously allowed letter of March 5, 1923		$295,000.00
Corrected value: 12336 acres at $2.02 per acre	$25,000.00	
62000M feet B. M. at 3.00 per M	186,000.00	211,000.00
Reduction in invested capital		$84,000.00

W. P. Brown & Sons Lumber Company. Year ended December 31, 1917.

Schedule 6

Computation of Tax, 1917 Act—Excess Profits Tax.
Corporation

Net income subject to Excess Profits Tax Sch 4	$200,355.17
Invested capital Sch. 5	612,017.42
Variable deduction 9%	55,081.57
Specific exemption	6,000.00
Total deduction	$61,081.57

	Income	Deductions	Balance	Rate	Tax
15%	$91,602.61	$61,081.57	$30,721.04	20	$6,144.21
5%	30,600.87		30,600.87	25	7,650.22
5%	30,600.87		30,600.87	35	10,710.31
Bal.	47,350.82		47,350.82	45	21,307.87
Total	200,355.17	61,081.57	139,272.60		45,812.61

Allocation of Tax

Name of company	Per cent	Amount
W. P. Brown & Sons Lumber Co	79	$36,191.96
Brown Bros. Land & Lumber Co.	21	9,620.65

Schedule 7

Computation of Tax 1917—Total Tax (Partnership)

	Income	Tax
Taxable net income, Sch. 2	$159,114.19	
Deduct: Excess profits tax Sch. 6..	36,191.96	$36,191.96
Balance not subject to normal tax	122,922.23	
[fol. 11] Total Tax Liability		36,191.96
Previously assessed:		
April 1918 P. 69, L. 3	16,690.25	
March 1923, Spl. 7, P. O. L. O	38,035.46	
		54,825.71
Overassessment		$18,533.75

Claim for abatement in the amount of $38,035.46 filed March 27, 1923.

Brown Brothers Lands & Lumber Company.

Schedule 8

Computation of Tax, 1917—Total Tax

	Income tax	
Taxable net income, Sch. 3..	$43,989.07	
Deduct: Excess Profits Tax, Sch. 6	9,620.65	$9,620.65
Taxable at 2%	34,368.42	687.37
Taxable at 4%	34,368.42	1,374.74
Total Tax Liability		11,682.76
Previously assessed: March 1923 Special 6, Page 6, Line 5		15,831.49
Overassessment		4,148.73

Claim for abatement in the amount of $15,831.48 filed June 1, 1923.
dp-5.

Now, March 1, 1929, the foregoing Petition certified from the record as a true copy.
B. D. Gamble, Clerk, U. S. Board of Tax Appeals.
(Seal.)

[fol. 12] BEFORE U. S. BOARD OF TAX APPEALS

ANSWER—Filed Jan. 16, 1926

Now comes the Commissioner of Internal Revenue by his attorney, A. W. Gregg, Solicitor of Internal Revenue, and for answer to each paragraph of the taxpayer's petition admits and denies as follows:

1. Admits the allegations of fact contained herein.

2. Admits that on October 28, 1925, the Commissioner mailed to the taxpayer a letter, a copy of which is attached to the petition, but denies that the said letter constitutes a deficiency letter within the meaning of Section 274 of the Revenue Act of 1924.

3. Admits the allegations of fact contained herein.

4. Denies that the Commissioner has committed any errors in arriving at the tax liability of the appellant for the calendar year 1917.

5 (sub-paragraph 1). Admits that on March 1, 1913, the subsidiary herein, Brown Brothers Land and Lumber Company, owned what is known as the Robe Lake Timber Tract consisting of 12,336 acres of land; denies that there was on the land approximately 64,000,000 feet of standing merchantable timber and 8,500,000 bolts; denies that the said land was acquired by purchase in 1911; admits that the tract of land in question is located near Brasfield, Arkansas.

5 (sub-paragraph 2). Denies all the allegations of fact contained herein.

5 (sub-paragraph 3). Admits that the Commissioner has allowed depletion at the rate of $3.00 per thousand feet on the timber consumed in operation in 1917, but denies that the Commissioner has alleged that the cost of the aforementioned property and its value as of March 1, 1913, were the same; denies that the fair market value at March 1, 1913, of the timber contained in the said Robe Lake tract consisted of approximately 64,000,000 feet, or that its March 1, 1913, value was $561,280.00, or any other value in excess of $211,000.00; admits that the footage cut in 1917 was 8,345,000 feet, and denies that the fair market value of such footage on March 1, 1913, plus subsequent capitalized costs was $73,219.52, or any other amount in excess of $25,035.00; and admits that the Commissioner as allowed depletion for the calendar year 1917 in the amount of $25,035.00.

5 (sub-paragraph 4). Admits all the allegations of fact contained herein.

5 (sub-paragraph 5). Admits all the allegations of fact contained herein, except the last sentence thereof reading: [fol. 13] "This letter evidences the final determination by the Commissioner of the 1917 deficiency," which allegation is specifically denied.

6. Denies generally and specifically each and every allegation of fact contained in the taxpayer's petition not hereinbefore admitted qualified or denied.

Before U. S. Board of Tax Appeals

Propositions of Law

1. The depletion allowed this taxpayer is in accordance with Section 12(a) Second of the Revenue Act of September 8, 1916, as amended by the Revenue of October 3, 1917.

2. The taxpayer's invested capital has been correctly computed in accordance with Section 207 of the Revenue Act of October 3, 1917.

Wherefore, it is prayed that the taxpayer's appeal be denied.

A. W. Gregg, Solicitor of Internal Revenue, Attorney for Commissioner of Internal Revenue. Of Counsel: Arthur J. Seaton, Special Attorney, Bureau of Internal Revenue.

Now, March 1, 1929, the foregoing Answer certified from the record as a true copy.

B. D. Gamble, Clerk, U. S. Board of Tax Appeals. (Seal)

[fol. 14] BEFORE U. S. BOARD OF TAX APPEALS

AMENDMENT TO PETITION—Filed May 19, 1927

Now comes the above-named petitioners and by leave of the Board of Tax Appeals file this, their amendment to the petition, and allege as follows:

Any and all liability for any part of the deficiency involved in this proceeding has been extinguished by the statute of limitations, for the following reasons:

The petitioners herein filed in 1918 their income-profits tax returns for the calendar year 1917. During the month of March, 1923, respondent assessed additional taxes of $53,866.95 against the petitioners, as follows:

W. P. Brown & Sons Lumber Company	$38,035.46
Brown Brothers Land & Lumber Company	15,831.49
Total deficiency assessed	$53,866.95

Upon receipt of notice and demand for the payment of these additional taxes, abatement claims were duly filed with and accepted by the Collector of Internal Revenue for the entire amount of the deficiency. Under date of October 28, 1925, more than five years after the date on which the returns for 1917 were filed, respondent addressed a letter (a copy of which is attached to the original petition) to the petitioners, wherein petitioners were advised that of the additional taxes of $53,856.95 assessed in March, 1923, $22,682.48 would be abated and that the claims for abatement would be rejected for the balance of $31,184.47.

No suit or proceeding for the collection of such balance or any part thereof has been instituted or begun by respondent.

In view of the foregoing facts, all liability for the deficiency involved in this proceeding has been extinguished by the statute of limitations, which is now pleaded and relied upon in bar of the determination of said deficiency, or any part thereof.

Wherefore, the petitioners pray as in their original petition, that it be held by the Board that all liability for said deficiency has been extinguished by the statute of limitations, and for such other relief as may appear equitable and proper as this cause progresses.

W. W. Spalding, Counsel for Petitioners, Woodward Building, Washington, D. C.

[fol. 15] *Duly sworn to by J. G. Brown. Jurat omitted in printing.*

Now, March 1, 1929, the foregoing Amendment to Petition certified from the record as a true copy.

B. D. Gamble, Clerk, U. S. Board of Tax Appeals.
(Seal.)

Before U. S. Board of Tax Appeals

Answer to Amendment to Petition—Filed June 28, 1927

Now comes the Commissioner of Internal Revenue, by his attorney, A. W. Gregg, General Counsel, Bureau of Internal Revenue, and for answer to the amendment to the petition of these petitioners, admits and denies as follows:

Admits that the petitioners filed in 1918 their income and profits tax returns for the calendar year 1917 and that [fol. 16] during the month of March, 1923, the respondent assessed additional taxes of $53,866.95 against the petitioners as follows:

W. P. Brown & Sons Lumber Company	$38,035.46
Brown Brothers Land & Lumber Company	15,831.49
Total deficiency assessed	$53,866.95

Admits that upon receipt of notice and demand for payment of said additional taxes abatement claims were filed with and accepted by the Collector of Internal Revenue for the entire amount of the deficiency and that under date of October 28, 1925, the respondent addressed a letter to the petitioners advising them that of the additional taxes of $53,866.95 assessed in March, 1923, $22,682.48 would be abated and that the claims for abatement would be rejected for the balance of $31,184.47.

Denies that all liability for the deficiency involved in this proceeding has been extinguished by the statute of limitations.

Denies, generally and specifically, each and every allegation of error or of fact contained in the taxpayer's amendment to petition not hereinbefore admitted, qualified or denied.

Wherefore, it is prayed that the taxpayers' amendment to petition be denied.

A. W. Gregg, General Counsel, Bureau of Internal Revenue. Of Counsel: Maxwell E. McDowell, Special Attorney, Bureau of Internal Revenue.

Now, March 1, 1929, the foregoing Answer to Amendment to Petition certified from the record as a true copy.

B. D. Gamble, Clerk, U. S. Board of Tax Appeals. (Seal.)

[fol. 17] BEFORE U. S. BOARD OF TAX APPEALS

MEMORANDUM OPINION

W. W. Spalding, Esq., for the petitioner.

Maxwell E. McDowell, Esq., and Frank B. Slosser, Esq., for the respondent.

STERNHAGEN:

This proceeding originally presented three issues, two of which affected the merits of the Commissioner's determination of deficiencies, and the third presented the question whether the deficiencies were barred by the limitation provisions of the statute. At the hearing the parties agreed

to dispose of the first two issues and stated that the amount of the deficiencies was agreed upon in the event that the Board should decide that the statute of limitations had not extinguished the liability. It remains, therefore, only to consider whether the deficiencies are barred.

The taxable year in question is 1917, and for that year the petitioners, t*go*ether with another corporation, have been treated as affiliated and their tax liability thus considered as upon a consolidated return. It appears to have been assumed that the returns for 1917 were duly filed in or about March, 1918. Thereafter the taxpayers signed waivers of all statutory time limitations for assessment. These signed waivers are stamped as having been received by the Commissioner, December 13, 1920, and were signed by the Commissioner under date of December 2, 1922. The period of extension was not limited.

In March, 1923, additional taxes for 1917 were assessed against both corporations, and abatement claims were filed.

On or about December 15, 1923, the petitioners and the respondent signed written consents in writing to a determination, assessment, and collection of any taxes due for 1917 and 1918, to remain in effect for one year from the date signed by the taxpayer. Thereafter, on October 25, 1924, the W. P. Brown & Sons Lumber Company, and the Commissioner signed a further consent in writing for a determination, assessment, and collection of the 1917, 1918, and 1919 taxes, to remain in effect for one year after the expiration of any statutory period or period of any waivers already on file.

These facts are substantially similar to those of G. L. Ramsey, B. T. A., (April 2, 1928) in which the Board held that the six-year provision of section 278(d) of the Revenue Act of 1924, applied to a 1917 tax of which the period for collection had by waivers been extended to a date subsequent to June 2, 1924, when the statute was enacted. In [fol. 18] the present case the situation is parallel, and we therefore follow the precedent of the Ramsey decision and hold that the deficiencies for 1917 are not barred by the statute.

In accordance with the statement made by the parties at the hearing, they will be expected to agree upon and file a proposed order of redetermination.

Entered Jul. 25, 1928.

A true copy: Teste.

B. D. Gamble, Clerk, U. S. Board of Tax Appeals.

Now, March 1, 1929, the foregoing Memorandum Opinion certified from the record as a true copy.

B. D. Gamble, Clerk, U. S. Board of Tax Appeals.

(Seal.)

Before U. S. Board of Tax Appeals

Stipulation and Form of Order—Filed Aug. 4, 1928

Now come the parties to the above-entitled appeal and, by their respective attorneys in accordance with the agreed statement of account submitted at the hearing and marked for record at page 4 of the transcript and in accordance with the instructions of the Board's Memorandum Opinion entered herein on July 25, 1928, agree that the Board may enter its final order of redetermination in the following form:

Order of Redetermination and Judgment

The above-entitled action came on for hearing on April 26, 1928. Now upon the stipulated agreement of record and upon consideration of the premises herein and in accordance with the opinion heretofore promulgated on July 25, 1928, it is

[fol. 19] Ordered, Adjudged and Determined: That for the year 1917 there is a deficiency in payment of $3,498.27 and an unpaid assessment to be abated in the amount of $11,140.93 with respect to the petitioner W. P. Brown and Sons Lumber Company and that for the year 1917 there is a deficiency in payment of $5,001.85 and an unpaid assessment to be abated in the amount of $6,680.91 with respect to the petitioner Brown Brothers Land and Lumber Company.

This stipulation is submitted in accordance with the decision of the Board without prejudice to the petitioner's right to contest the correctness of the decision pursuant to the statute in such cases made and provided.

W. W. Spalding, Counsel for Petitioner. (Signed) C. M. Charest, General Counsel, Bureau of Internal Revenue.

Now, March 1, 1929, the foregoing Stipulation & Form of Order certified from the record as a true copy.

B. D. Gamble, Clerk, U. S. Board of Tax Appeals. (Seal.)

BEFORE U. S. BOARD OF TAX APPEALS

JUDGMENT

Pursuant to the Board's report in the above entitled proceeding, entered July 25, 1928, and the stipulation of the parties filed August 4, 1928, it is

Ordered, Adjudged and Decided that as to the petitioner W. P. Brown & Sons Lumber Company, for 1917, there is a deficiency in payment of $3,498.27, and an unpaid assessment to be abated in the amount of $11,140.93, and as to the petitioner Brown Brothers Land & Lumber Company, for 1917, there is a deficiency in payment of $5,001.85, [fol. 20] and an unpaid assessment to be abated in the amount of $6,680.91.

A True Copy. Teste:

B. D. Gamble, Clerk, U. S. Board of Tax Appeals. (Seal.)

Entered Aug. 10, 1928.

Enter

(Signed) John M. Sternhagen, Member, United States Board of Tax Appeals.

Now, March 1, 1929, the foregoing Judgment certified from the record as a true copy.

B. D. Gamble, Clerk, U. S. Board of Tax Appeals. (Seal.)

BEFORE U. S. BOARD OF TAX APPEALS

PETITION FOR REVIEW IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT—Filed Jan. 23, 1929

Now come appellants, W. P. Brown & Sons Lumber Company and Brown Brothers Land & Lumber Company affiliated corporations, by their attorney, W. W. Spalding, and respectfully represent as follows:

I

W. P. Brown & Sons Lumber Company and Brown Brothers Land & Lumber Company are corporations, organized and existing under and by virtue of the laws of States of the United States, with principal offices and place of business at Louisville, Kentucky. The income-profits tax returns of appellants for 1917 were made to the Collector of Internal Revenue at Louisville, Kentucky, who has an office in that City, which is within the jurisdiction of the United States Circuit Court of Appeals for the Sixth Circuit. Hon. David H. Blair is the duly appointed, [fol. 21] qualified and acting Commissioner of Internal Revenue, appointed and holding his office by virtue of the laws of the United States.

II

The nature of the controversy is as follows, to-wit:

The correct determination of income and excess profits taxes due and owing by the appellants, as affiliated corporations, for the calendar year 1917.

For that calendar year (1917), appellants duly filed with the Collector of Internal Revenue at Louisville, Kentucky, their consolidated income and excess profits tax returns in March, 1918. In said returns, the appellants endeavored to report their true and correct consolidated invested capital and their true taxable income, and paid when due all income and excess profits taxes shown thereon, to said Collector of Internal Revenue at Louisville, Kentucky.

The first provision of any of the Revenue Acts of the United States, under which the time for assessment and collection of taxes could be extended beyond the statu-

tory period for making such assessment and collection, is in Section 250(d) of the Revenue Act of 1921. This section provides that assessment of any income-profits taxes for 1917 shall be made within five years after the return for that year was filed, and no proceeding in distraint or in Court shall be begun for the collection thereof after five years from the date such return was filed, unless the Commissioner and the taxpayer shall agree in writing to a later determination, assessment, and collection of such taxes. The proper construction of this section, as appellants are advised and believe, is that any such consent, to be effective, must be given before the expiration of the statutory period of limitation, viz., five years from the date of the filing of the return.

The appellants herein did not, prior to the expiration of the period of limitations, fixed by Section 250(d) of the Revenue Act of 1921, agree with the Commissioner of Internal Revenue, or consent in writing, to a later collection of additional taxes due from them for the calendar year 1917.

On or about the first day of March, 1923, the Commissioner of Internal Revenue made additional assessments of income-profits taxes against appellants for 1917, in the amount of $38,035.46 against appellant W. P. Brown & Sons Lumber Company, and in the amount of $15,831.49 against appellant Brown Brothers Land & Lumber Company. However, said additional assessments were not col- [fol. 22] lected within said five-year period, and within that period no proceedings in distraint or in Court for the collection of said additional assessments, or either of them, were instituted by appellee or any of his representatives.

On or about December 10, 1923, after the period for the collection of said additional assessments had expired, the Commissioner of Internal Revenue, under a misapprehension of law and fact, mailed to appellants, for them to sign, a printed form which purported to be a consent in writing for the assessment and collection of additional taxes for the calendar year 1917, at a later date than provided by law, viz., five years after the return was filed. Appellants, also under a misapprehension of law and fact, signed said writing and returned the same to the said Commissioner of Internal Revenue, on or about December 15,

1923. By its terms said writing expired one year after the date on which it was signed by appellants.

Thereafter, to-wit, on or about October 25, 1924, one of the appellants only, W. P. Brown & Sons Lumber Company, signed a further consent in writing for a determination, assessment, and collection of said taxes within one year after the expiration of any statutory period or period of any waiver already on file. This last named consent was not signed or given by appellant, Brown Brothers Land & Lumber Company; and the only waiver or consent given to appellee by that company, relating to collection, was that given on or about December 15, 1923, referred to above.

Relative to these waivers or consents, appellants are advised as follows:

(a) They are ineffective because given after the expiration of the statutory period for making collection of 1917 income-profits taxes assessed prior to June 2, 1924.

(b) The waiver of December 15, 1923, expired by its terms in December, 1924, which was before the mailing of the deficiency notice in the present case.

(c) The waiver of October 25, 1924, expired by its terms in December, 1925. It did not affect appellant, Brown Brothers Land & Lumber Company; and appellants now raise the additional question of whether the statutory period of collection was extended by the mailing of the deficiency notice of October 28, 1925.

On October 28, 1925, appellee mailed to appellants a 60-days' deficiency notice, as provided by Section 274 of the Revenue Act of 1924, in which notice he rejected and denied the claims for abatement filed against said addi- [fol. 23] tional assessments to the extent of $19,501.71 in the case of appellant W. P. Brown & Sons Lumber Company, and to the extent of $11,682.74 in the case of appellant Brown Brothers Land & Lumber Company, the remainder of said abatement claims being allowed.

Within sixty days after the receipt of said notice of deficiency, appellants filed their petition for an appeal to the United States Board of Tax Appeals, from appellee's determination set forth therein.

III

In their petition for appeal to the United States Board of Tax Appeals, appellants assigned errors and contended that at the time said deficiency notice was mailed to them and on every date thereafter, the taxes proposed to be collected were barred by the statute of limitations.

Said proceeding came on for hearing before the United States Board of Tax Appeals on June 25, 1928; and shortly thereafter the Board made findings of fact and issued a memorandum opinion to the effect that the taxes proposed to be collected were not barred by the statute of limitations.

IV

Thereafter, to-wit, on August 10, 1928, the United States Board of Tax Appeals entered its final order of redetermination, in which it ordered, adjudged, and decided that as to the appellant W. P. Brown & Sons Lumber Company, for the year 1917, there is a deficiency in payment of $3,498.27, and an unpaid assessment to be abated in the amount of $11,140.93; and as to the appellant Brown Brothers Land & Lumber Company, for the year 1917, there is a deficiency in payment of $5,001.85, and an unpaid assessment to be abated in the amount of $6,680.91.

V

The appellants, being aggrieved by the findings of fact and decision of the United States Board of Tax Appeals, desire to obtain a review thereof by the United States Circuit Court of Appeals for the Sixth Circuit.

Wherefore, appellants pray that a transcript of record be prepared in accordance with the rules of said United States Circuit Court of Appeals for the Sixth Circuit, and transmitted to the Clerk of said Court for filing and for appropriate action, to the end that the errors complained of may be reviewed and corrected by the United States Cir-[fol. 24] cuit Court of Appeals for the Sixth Circuit.

VI

Appellants aver that there was and is manifest error in the findings of fact and decision of the United States Board of Tax Appeals, and now make the following assignment of errors for the review thereof:

1. The United States Board of Tax Appeals erred in holding that the appellant and the Commissioner of Internal Revenue could, under the provisions of Section 250 (d) of the Revenue Act of 1921, after the five-year period for making assessment and collection of taxes had expired, extend the period for a later determination, assessment, and collection thereof.

2. The United States Board of Tax Appeals erred in holding and concluding, as a matter of law, that the collection of the deficiencies proposed against appellants for the year 1917 were not barred by the statute of limitations at the time the consents of December 15, 1923, and October 25, 1924, were executed; also, at the time the deficiency notice of October 28, 1925, was mailed to appellants; and, finally, at the time the order of redetermination herein was entered.

3. The United States Board of Tax Appeals erred in not finding, from the wording of the first of the two waivers herein involved, that it expired prior to the mailing of the deficiency notice and was never renewed by appellant Brown Brothers Land & Lumber Company, thereby relieving that company of all liability for any part or all of the additional assessment against it for 1917.

4. The United States Board of Tax Appeals erred in not finding that prior to the promulgation of its decision and the making of the redetermination herein the second waiver herein involved given solely by W. P. Brown & Sons Lumber Company expired in accordance with its terms and therefore became wholly ineffective.

5. The United States Board of Tax Appeals erred in not finding that both said waivers were signed and delivered by the appellants signatory thereto under a misapprehension of law and fact.

(Signed) W. W. Spalding.

STATE OF KENTUCKY
County of Jefferson ss:

J. G. Brown makes oath in due form of law and says that he is the President of the appellant corporations in the fore-[fol. 25] going petition for review; that he has read the foregoing petition and is acquainted with the facts stated

therein and that they are true to the best of his knowledge, information and belief; and that he verily believes that the petitioner is entitled to the relief sought by review of the findings of fact and decision of the United States Board of Tax Appeals rendered June 25, 1928, and final order entered August 10, 1928.

(Signed) J. G. Brown.

Subscribed and sworn to before me by J. G. Brown this 12 day of January, 1929.

(Signed) M. Burke, Notary Public. (Seal.) My commission expires Aug. 26, 1930.

Service of the foregoing petition is acknowledged this the 21st day of January, 1929.

(Signed) C. M. Charest, General Counsel of Internal Revenue, Attorney for Appellee.

Now, March 1, 1929, the foregoing Petition for Review with proof of service certified from the record as a true copy.

B. D. Gamble, Clerk, U. S. Board of Tax Appeals. (Seal.)

Before United States Board of Tax Appeals

Statement of Evidence—Filed Feb. 27, 1929

At the hearing of the above entitled proceeding on April 26, 1928, before Hon. John M. Sternhagen, presiding member, the following proceedings were had, evidence presented, stipulations made, and rulings made by the presiding member.

[fol. 26] At the hearing the petitioners were represented by W. W. Spalding; the respondent by Maxwell E. McDowell, Frank B. Schlosser, and C. M. Charest, General Counsel of Internal Revenue.

Colloquy

The following is a statement of the proceedings:

Mr. Spalding: If your Honor please, this case is prepared for hearing on the merits. Depositions were taken,

and after they were taken the Bureau of Internal Revenue made another inspection of the timber lands of this company located in the south, and as a result of that inspection we have been able to reach an agreement with the General Counsel's office regarding the amount of the deficiency, provided the question of limitation be decided adversely to the taxpayer.

That leaves in the case only the question of limitation, and we have agreed, Mr. McDowell and Mr. Schlosser on the one hand and I on the other, that we will submit to your Honor a statement of the deficiency, conditioned by the decision of the Board on the limitation question.

I therefore hand in the stipulation as to the amount of the deficiency, conditioned upon the decision on the limitation question. Of course, if the Board holds our way on the limitation question there will be no tax.

The Member: In other words, you say that any deficiency is barred by the statute of limitations in the statute, but that if it is not barred then the disposition of the case on the merits is to be in accordance with this stipulation.

Mr. Spalding: Yes.

Mr. McDowell will read into the record the facts relative to the limitation question, the date of filing of the return, the date of the assessment, the date of the waivers, etc.

The Member: Before you do that, this paper that you have just handed up here is simply entitled, "Statement of Account," and is a carbon copy of some figures, but it does not purport to be a stipulation. It is not signed by anybody.

Mr. McDowell: If your Honor please, rather than read that into the record and take the danger of errors that might creep in, we felt that our agreement appearing as of record under the statement of counsel here this morning supplemented by those figures, would constitute a valid stipulation.

The Member: That is all right. If what Mr. Spalding has just said, which, as I understood, was by way of a statement to the Board as to the situation, rather than a formal stipulation, if what he has just said is the expres-
[fol. 27] sion of an agreement between the two of you, it now appears in the record. That is true, is it?

Mr. McDowell: The respondent so regards that and agrees the statement made by counsel is agreed to by the respondent.

The Member: I do not want to have this general statement subject to difficulties which might be avoided if you had formally stated it in the form of a stipulation.

Mr. Spalding: Let me say this: We would have done that except for the fact we were delayed, both Mr. McDowell and I, by the failure of the income tax unit to compute that. They were delayed. They just gave us that a day or two ago.

The Member: Let this paper be marked as filed at the hearing.

The said paper was in words and figures as follows:

EXHIBIT

"Statement of Account

W. P. Brown & Sons Lumber Company

1917

Total tax assessed:		
Original	$16,690.25	
Additional	38,035.46	
		$54,725.71
Less: Overassessment allowed		18,533.75
Net assessment		$36,191.96
Tax paid	$16,690.25	
By credit	4,862.51	
Total payment		$21,552.76
Correct tax liability		$25,051.03
Deficiency in payment		$ 3,498.27
Unpaid assessment to be abated		$11,140.93
Total tax assessed		$15,831.49
Less: Overassessment allowed		4,148.73
Net assessment		$11,682.76
Tax paid		None
Correct tax liability		5,001.85

Deficiency in payment	5,001.85
Unpaid assessment to be abated	6,680.91"

Mr. McDowell: With respect to the question of the statute of limitations raised in the amended pleading in this hearing, or in this appeal, the parties have agreed that the [fol. 28] following is an agreed statement between them, and submit it to the Board as a correct statement of the facts material for the Board's determination of that issue.

The companies in this statement will be referred to as Company No. 1 and Company No. 2. Company No. 1 is the W. P. Brown & Sons Lumber Company. Company No. 2 is the Brown Brothers Land & Lumber Company.

The return for the year 1917 of Company No. 1 was filed on April 1, 1918.

The return for the same year 1917 of Company No. 2, was filed on March 30, 1918.

On December 13, 1920, both Companies No. 1 and No. 2 filed unlimited waivers for the assessment of taxes in the year 1917. These waivers were signed by the Commissioner on December 2, 1922. It is the intention of the parties to submit in supplement of this statement the original of all waivers referred to in the statement.

In the month of March, 1923, an assessment was listed against Company No. 1, in the sum of $38,035.46 and in the same month of March, 1923, an assessment was listed again Company No. 2, in the sum of $15,836.49.

Company No. 1 filed a claim in abatement for the total amount of the assessment against it of $38,035.46 under date of March 27, 1923.

Company No. 2 filed a similar claim in abatement in the assessment of $15,836.49 on June 1, 1923.

Waivers of assessment and collection of the tax were filed by both companies extending the period for such assessment and collection to December 10, 1924, under date of December 14, 1923.

The Member: They will be put in evidence, will they, the originals?

Mr. McDowell: Yes, sir. They will be so submitted.

Company No. 1 on October 25, 1924, filed a waiver of assessment and collection of the 1917 tax, extending the period to December 10, 1925.

On October 28, 1925, a deficiency letter was mailed by the Commissioner to Company No. 1, showing the Commissioner's action on the claim on abatement filed by this Company and stating an overassessment of $18,533.75.

On the same date, October 28, 1925, a similar deficiency letter was sent to Company No. 2, showing an overassessment of $4,148.73.

This appeal filed by both Companies No. 1 and No. 2 was filed with the Board on November 18, 1925.

I submit the first waiver referred to assessment filed on December 13, 1920, by Company No. 1 as joint Exhibit No. 1.

[fol. 29] The Member: That will be received in evidence as joint exhibit No. 1.

(Said document, "Joint Exhibit No. 1," was in words and figures as follows:

JOINT EXHIBIT No. 1

"U. S. Board of Tax Appeals, Div. 10, Docket 9218

Admitted in Evidence April 26, 1928. Received Dec. 13, 1920, Natural Resources Sub-Division.

IT:SA:NR.

Waiver

W. P. Brown & Sons Lumber Company, a corporation, organized under the laws of the State of Kentucky, in consideration of the assurance given it by officials of the Income Tax Unit of the Bureau of Internal Revenue that its liability for all Federal taxes imposed by the Act of Congress, approved September 8, 1916, as amended by the Act of Congress, approved October 3, 1917, for the year ended December 31, 1917, on its net income received from all sources in said year, shall not be determined except after deliberate, intensive and thorough consideration, hereby waives any and all statutory limitations as to the time within which assessments based upon such liability may be entered. It is understood, however, that the above corporation does not, by the execution of this waiver, admit in advance the correctness of any assessment which may

be made against it for said year by the officials of the Income Tax Unit.

W. P. Brown & Sons Lumber Co. (Signed) Per J. G. Brown, Pres. (S.) Corporation. Seal.) (Corporate Seal.)

Approved Dec. 2, 1922. D. H. Blair (S.) Commissioner of Internal Revenue."

Mr. McDowell: I submit the second waiver referred to filed on December 13, 1920, by Company No. 2, as "Joint Exhibit No. 2."

(Said document, "Joint Exhibit No. 2," was in words and figures as follows):

[fol. 30] JOINT EXHIBIT #2

"U. S. Board of Tax Appeals, Div. 10, Docket 9218

Admitted in Evidence April 26, 1928. Received Dec. 13, 1920. Natural Resource Sub-Division.

IT:SA:NR.

Waiver

Brown Bros. Land and Lumber Company, a corporation, organized under the laws of the State of Tennessee, in consideration of the assurance given it by officials of the Income Tax Unit of the Bureau of Internal Revenue that its liability for all Federal taxes imposed by the Act of Congress, approved September 8, 1916, as amended by the Act of Congress, approved October 3, 1917, for the year ended December 31, 1917 on its net income received from all sources in said year, shall not be determined except after deliberate, intensive and thorough consideration, hereby waives any and all statutory limitations as to the time within which assessments based upon such liability may be entered. It is understood, however, that the above corporation does not, by the execution of this waiver, admit in advance the correctness of any assessment which may be made against it for said year by the officials of the Income Tax Unit.

Brown Bros. Lumber Co. (S.) (Signed) J. G. Brown, V. Pres., Corporation, by —— —— (Title). (Corporate Seal.)

Approved Dec. 2, 1922. D. H. Blair (S.) Commissioner of Internal Revenue."

Mr. McDowell: I submit the waiver of Company No. 1, filed on December 14, 1923, as "Joint Exhibit No. 3."

(Said document, "Joint Exhibit No. 3," reads in words and figures as follows):

[fol. 31] JOINT EXHIBIT #3

"U. S. Board of Tax Appeals, Div. 10, Docket 9218

Admitted in Evidence April 26, 1928. Received Dec. 14, 1923, Engineering Div. Dec. 10th, 1923. (Date.)

IT:EN:T.

Income and Profits Tax Waiver

In pursuance of the provisions of subdivision (d) of Section 250 of the Revenue Act of 1921, W. P. Brown and Sons Lumber Company of Louisville, Kentucky, and the Commissioner of Internal Revenue, hereby consent to a determination, assessment, and collection of the amount of income, excess-profits, or war-profits taxes due under any return made by or on behalf of the said * * * for the years 1917 and 1918, under the Revenue Act of 1921, or under prior income, excess-profits, or war-profits tax Acts, or under Section 38 of the Act entitled "An Act to provide revenue, equalize duties, and encourage the industries of the United States, and for other purposes," approved August 5, 1909. This waiver is in effect for one year from the date it is signed by the taxpayer.

W. P. Brown & Sons Lumber Co. (S.), by Preston P. Joyes, Treas. (Seal.) D. H. Blair, (S.) Commissioner."

Dec. 15, 1923.

"If this waiver is executed on behalf of a corporation, it must be signed by such officer or officers of the corporation as are empowered under the law of the State in which the corporation is located to sign for the corporation, in addi-

tion to which, the seal, if any, of the corporation must be affixed."

Mr. McDowell: I submit the waiver of Company No. 2, filed December 14, 1923, as "Joint Exhibit No. 4."

(Said document, "Joint Exhibit No. 4," was in words and figures as follows):

[fol. 32] JOINT EXHIBIT #4

"U. S. Board of Tax Appeals, Div. 10, Docket 9218

Admitted in Evidence, April 26, 1928. Received Dec. 14, 1923. Engineering Div. Dec. 10th, 1923.

IT:En;T.

Income and Profits Tax Waiver

In pursuance of the provisions of subdivision (d) of Section 250 of the Revenue Act of 1921, Brown Brothers Land and Lumber Company of * * * and the Commissioner of Internal Revenue, hereby consent to a determination, assessment, and collection of the amount of income, excess-profits, or war-profits taxes due under any return made by or on behalf of the said * * * for the years 1917 and 1918 under the Revenue Act of 1921, or under prior income, excess profits, or war profits tax Acts, or under Section 38 of the Act entitled "An Act to provide revenue, equalize duties, and encourage the industries of the United States, and for other purposes," approved August 5, 1909. This waiver is in effect for one year from the date it is signed by the taxpayer.

Brown Bros. Land and Lumber Co. (S.), by Preston P. Joyes, Treas. (Seal.) D. H. Blair (S), Commissioner.

Dec. 15, 1923."

"If this waiver is executed on behalf of a corporation, it must be signed by such officer or officers of the corporation as are empowered under the laws of the State in which the corporation is located to sign for the corporation, in addi-

tion to which, the seal, if any, of the corporation must be affixed."

I submit a waiver of Company No. 1, filed October 25, 1924, as "Joint Exhibit No. 5."

(Said document, "Joint Exhibit No. 5," was in words and figures as follows):

[fol. 33] JOINT EXHIBIT #5

"U. S. Board of Tax Appeals, Div. 10, Docket 9218

Admitted in Evidence, April 26, 1928. Feb. 24, 1926, Recd. October 25, 1924 (Date).

Income and Profits Tax Waiver

In pursuance of the provision of existing Internal Revenue Laws, W. P. Brown and Sons Lumber Company, a taxpayer, of Louisville, Kentucky, and the Commissioner of Internal Revenue, hereby consent to extend the period prescribed by law for a determination, assessment, and collection of the amount of income, excess-profits, or war-profits taxes due under any return made by or on behalf of said taxpayer for the years 1917, 1918 and 1919 under the Revenue Act of 1924, or under prior income, excess-profits, or war-profits tax Acts, or under Section 38 of the Act entitled "An Act to provide revenue, equalize duties, and encourage the industries of the United States, and for other purposes," approved August 5, 1909. This waiver is in effect for a period of one year after the expiration of the statutory period of limitation within which assessments of taxes may be made for the year or years mentioned, or the statutory period of limitations as extended by Section 277(b) of the Revenue Act of 1924, or by any waivers already on file with the Bureau.

W. P. Brown & Sons Lumber Co. (S.), by J. G. Brown, Pres. (S).

(Received in Review Division, Feb. 26, 1925, Solicitor's Office.)"

Attest: LeRoy Olcott, (S), Secretary. (Seal.)

"If this waiver is executed on behalf of a corporation, it must be signed by such officer or officers of the corporation as are empowered under the law of the State in which the corportion is located to sign for the corporation, in addition to which, the seal, if any, of the corporation must be affixed."

Mr. McDowell: If your Honor please, this, I believe, concludes the presentation of all the necessary facts to the Board.

[fol. 34] The Member: Mr. Spalding, that is your agreed statement is it?

Mr. Spalding: Yes. Counsel has stated the facts correctly.

The Member: There is one possibility of discrepancy that I ought to be sure about. In so far as you in your oral agreement between you have attempted to state the effect of the waivers, so-called waivers, that statement must, of course, be taken for what it is worth and must give way to what the Board regards as proper significance of the waivers that have actually been in evidence; in other words, what I mean to say, you both understand, I assume, and intend that where it has been stated on the record that the petitioner or one of the other petitioners filed a waiver extending the period to such and such a date, for example, that must be taken only in the light of what the waiver itself that has been put in evidence provides, and you are not attempting to stipulate what the Board shall regard as the significance of the waivers.

Mr. McDowell: That is the understanding of the respondent.

The Member: I do not want either of you to be surprised in the event that when the Board examines the waivers it should find it meant something different from what you thought it meant.

Mr. Spalding: Mr. McDowell was endeavoring to identify the waivers. Your Honor's understanding of it is correct.

The foregoing statement contains all of the evidence, exhibits, stipulations, and rulings made at the hearing of this cause.

ORDER APPROVING STATEMENT OF EVIDENCE

Be it further remembered, that the foregoing contains all evidence, exhibits, stipulations, and rulings presented and made on the hearing of this proceeding; and in order that same may be preserved and made of record this statement of evidence is duly accepted, approved, signed, and ordered to be made of record in the above entitled proceedings this 27 day of February, 1929.

By the Board, (S.) J. M. Sternhagen, Member.

Service of the foregoing statement of evidence presented by petitioners is acknowledged. This statement of evidence is correct and we consent to its immediate approval by the [fols. 35 & 36] presiding member. This 23rd day of February, 1929.

C. M. Charest, General Counsel, Bureau of Int. Rev., Counsel for Respondent. (S.) W. W. Spalding, Attorney for Petitioner.

Now, March 1, 1929, the foregoing Statement of Evidence certified from the record as a true copy.

B. D. Gamble, Clerk, U. S. Board of Tax Appeals. (Seal.)

BEFORE U. S. BOARD OF TAX APPEALS

PRAECIPE—Filed Jan. 29, 1929

The Clerk of the Board of Tax Appeals will please copy for purposes of the record for the appeal to the Circuit Court of Appeals, Sixth Circuit, the following portions of the record of the Board of Tax Appeals:

Docket entries.
Petition with exhibit.
Amendment to petition.
Answer.
Answer to amendment to petition.
Statement of Evidence.

Memorandum opinion.
Stipulation and form of order.
Judgment.
Petition for Review.
This Præcipe.

W. W. Spalding, Counsel for Petitioners.

We accept service of this præcipe. This January 29, 1929.
(Signed) C. M. Charest.

Now, March 1, 1929, the foregoing Præcipe with proof of service certified from the record as a true copy.

B. D. Gamble, Clerk, U. S. Board of Tax Appeals.
(Seal.)

[fol. 37] In United States Circuit Court of Appeals for the Sixth Circuit

Appearance of Counsel—Filed Mar. 14, 1929

J. W. Menzies, Clerk of said Court:

Please enter my appearance as Counsel for the Appellants.

W. W. Spalding, Woodward Bldg., Washington, D. C.

In United States Circuit Court of Appeals

Cause Argued and Submitted—Jan. 21, 1930

Before: Moorman, Mack and Hicks, J.J.

This cause is argued by W. W. Spalding for Appellants and by N. D. Keller for Appellee and is submitted to the Court.

In United States Circuit Court of Appeals

Decree—Filed Feb. 21, 1930

Appeal from the United States Board of Tax Appeals

This cause came on to be heard on the transcript of the record from the United States Board of Tax Appeals, and was argued by counsel.

On consideration whereof, It is now here ordered, adjudged, and decreed by this Court that the order or decree of the said Board of Tax Appeals in this cause be and the same is hereby reversed as to Brown Brothers Land & Lumber Company, and affirmed as to W. P. Brown & Sons Lumber Company.

[fol. 38] In United States Circuit Court of Appeals

Opinion—Filed Feb. 21, 1930

Before Moorman, Mack and Hicks, Circuit Judges.

Mack, Circuit Judge:

It is conceded by respondent that the question whether or not the deficiency assessment was collectible from Brown Brothers Land & Lumber Company is governed by Russell v. United States, 278 U. S. 181, decided since the order of redetermination was entered; therefore respondent consents to the reversal of that part of the Board's order which found that the collection of such deficiency was not barred by the statute of limitations.

On April 1, 1918, the other petitioner, W. P. Brown & Sons Lumber Company, filed its income and profits tax return for the year 1917; on December 13, 1920, it filed an unlimited waiver of "any and all statutory limitations as to the time within which assessments based upon such liability may be entered." On March 5, 1923, the Commissioner made a jeopardy deficiency assessment for the taxable year 1917 and in the same month petitioner filed a claim for the abatement thereof. Thereafter petitioner filed a further waiver dated December 10, 1923, in which it consented "to a determination, assessment, and collection of the amount of income, excess-profits, or war-profits taxes due under any return * * * for the years 1917 * * *." This waiver by its terms would have expired on December 10, 1924. On October 25, 1924, petitioner filed a similar waiver extending the period to "one year after the expiration of the statutory period of limitations within which assessment of taxes may be made for the year or years mentioned, or the statutory period of limitations as extended by § 277 (b) of the Revenue Act of 1924, or by any waivers already on file with the Bureau."

On October 28, 1925, respondent notified petitioner of a partial allowance of the claim in abatement and of the definite determination of the amount of the deficiency. On November 18, 1925, petitioner filed an appeal with the Board of Tax Appeals from this determination of de- [fol. 39] ficiency. Subsequently the amount of the deficiency assessment; if any was to be paid, was stipulated by the parties; and the appeal was thereafter confined solely to the question of whether or not its collection was barred by the statute of limitations. From the decision of the Board finding that the collection was not so barred, petitioner has brought this appeal. The pertinent statutes are set forth in the margin.[1]

"Sec. 250. (d) The amount of * * * taxes due * * * under prior income, excess-profits, or war-profits tax Acts * * * shall be determined and assessed within five years after the return was filed, unless both the Commissioner and the taxpayer consent in writing to a later determination, assessment, and collection of the tax; and no suit or proceeding for the collection of any such taxes * * * shall be begun, after the expiration of five years after the date when such return was filed * * *."

Revenue Act of 1924, c. 234, 43 Stat. 253:

"Sec. 274. (a) If, in the case of any taxpayer, the Commissioner determines that there is a deficiency in respect of the tax imposed * * * the taxpayer * * * shall be notified of such deficiency by registered mail, but such deficiency shall be assessed only as hereinafter provided. Within 60 days after such notice is mailed the taxpayer may file an appeal with the Board of Tax Appeals. * * *

"(b) If the Board determines that there is a deficiency, the amount so determined shall be assessed and shall be paid upon notice and demand from the collector. * * * proceeding [for collection] shall be begun within one year after the final decision of the Board, and may be begun within such year even though the period of limitation prescribed in section 277 has expired."

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[1] Revenue Act of 1921, c. 136, 42 Stat. 227:

"Sec. 277. (a) Except as provided in section 278 and in subsection (b) of section 274 and in subsection (b) of section 279.

* * * * * * *

"(2) The amount of income excess-profits, and war-profits taxes imposed by * * * the Revenue Act of 1917, * * * shall be assessed within five years after the return was filed, and no proceeding in court for the collection of such taxes shall be begun after the expiration of such period.

* * * * * * *

"(b) The period within which an assessment is required to be made by subdivision (a) of this section in respect of any deficiency shall be extended (1) by 60 days if a notice of such deficiency has been mailed to the taxpayer under subdivision (a) of section 274 and no appeal has been filed with the Board of Tax Appeals, or (2) if an appeal has been filed, then by the number of days between the date of the mailing of such notice and the date of the final decision by the Board."

"Sec. 278. * * *

"(d) Where the assessment of the tax is made within the period prescribed in section 277 or in this section, such tax may be collected by distraint or by a proceeding in court, begun within six years after the assessment of the tax. Nothing in this Act shall be construed as preventing the beginning, without assessment, of a proceeding in court for the collection of the tax at any time before the expiration of the period within which an assessment may be made.

"Sec. 280. If after the enactment of this Act the Commissioner determines that an assessment should be made in respect of any * * * tax imposed by * * * the Revenue Act of 1917 * * * the amount which should

[fol. 40] Petitioner contends: (1) that the waiver of December 13, 1920, cannot be relied upon because in terms it extended solely the right to assess and not the right to collect; (2) that both the waivers of December 10, 1923, and October 25, 1924, are inapplicable because they re-

late only to taxes due "under any return" and the assessment sought to be collected was not a return by petitioner but an additional assessment made by the Commissioner

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be assessed (whether as deficiency or as interest, penalty, or other addition to the tax) shall be computed as if this Act had not been enacted, but the amount so computed shall be assessed, collected, and paid in the same manner and subject to the same provisions and limitations (including the provisions in case of delinquency in payment after notice and demand) as in the case of the taxes imposed by this title, except as otherwise provided in section 277."

Revenue Act of 1926, c. 27, 44 Stat. 9:

"Sec. 274. (a) If in the case of any taxpayer, the Commissioner determines that there is a deficiency in respect of the tax imposed by this title, the Commissioner is authorized to send notice of such deficiency to the taxpayer by registered mail. Within 60 days after such notice is mailed (not counting Sunday as the sixtieth day) the taxpayer may file a petition with the Board of Tax Appeals for a redetermination of the deficiency. Except as otherwise provided in subdivision (d) or (f) of this section or in section 279, 282, or 1001, no assessment of a deficiency in respect of the tax imposed by this title and no distraint or proceeding in court for its collection shall be made, begun, or prosecuted until such notice has been mailed to the taxpayer, nor until the expiration of such 60-day period, nor, if a petition has been filed with the Board, until the decision of the Board has become final. Nothwithstanding the provisions of section 3224 of the Revised Statutes the making of such assessment or the beginning of such proceeding or distraint during the time such prohibition is in force may be enjoined by a proceeding in the proper court."

"Sec. 277. (a) Except as provided in section 278—

* * * * * * *

"(3) The amount of income, excess-profits, and war-profits taxes imposed by * * * the Revenue Act of 1917, * * * shall be assessed within five years after the return was filed, and no proceeding in court without

assessment for the collection of such taxes shall be begun after the expiration of such period."

* * * * * * *

"(b) The running of the statute of limitations provided in this section or in section 278 on the making of assessments and the beginning of distraint or a proceeding in court for collection, in respect of any deficiency, shall (after the mailing of a notice under subdivision [a] of section 274) be suspended for the period during which the Commissioner is prohibited from making the assessment or beginning distraint or a proceeding in court, and for 60 days thereafter."

"Sec. 278. * * *

"(d) Where the assessment of any income, excess-profits, or war-profits tax imposed by this title or by prior Act of Congress has been made (whether before or after the enactment of this Act) within the statutory period of limitation properly applicable thereto, such tax may be collected by distraint or by a proceeding in court (begun before or after the enactment of this Act), but only if begun (1) within six years after the assessment of the tax, or (2) prior to the expiration of any period for collection agreed upon in writing by the Commissioner and the taxpayer.

"(e) This section shall not bar a distraint or proceeding in court begun before the enactment of the Revenue Act of 1924; nor shall it authorize the assessment of a tax or the

[fol. 41] in 1923; (3) that such waivers are also invalid because they were filed after the expiration of the statutory period for enforcing collection; (4) and, finally, that these waivers by their terms expired prior to the entry of the Board's order, and since, as petitioner maintains § 277 (b) of the Act of 1924 is inapplicable to the right of collection, and the statute had run prior to the enactment of the Act of 1926, collection is now barred.

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collection thereof by distraint or by proceeding in court (1) if at the time of the enactment of this Act such assessment,

distraint or proceeding was barred by the statutory period of limitation properly applicable thereto, unless prior to the enactment of this Act the Commissioner and the taxpayer agreed in writing thereto or (2) contrary to the provisions of subdivision (a) of section 274 of this Act."

"Sec. 283. * * *

"(e) If any deficiency in any income war-profits, or excess-profits tax imposed * * * by * * * the Revenue Act of 1917, * * * was assessed before June 3, 1924, but was not paid in full before the date of the enactment of this Act, and if the Commissioner, after the enactment of this Act, finally determines the amount of the deficiency, he is authorized to send by registered mail to the person liable for such tax notice of such deficiency, which notice shall, for the purposes of this Act, be considered a notice under subdivision (a) of section 274 of this Act. In the case of any such final determination the amount of the tax (whether deficiency or interest, penalty, or other addition to the tax) shall, except as provided in subdivision (h) of this section, be computed as if this Act had not been enacted, but the amount so computed shall be collected and paid in the same manner and subject to the same provisions and limitations (including the provisions in case of delinquency in payment after notice and demand, and the provisions relating to claims and suits for refund) as in the case of a deficiency in the tax imposed by this title, except as otherwise provided in section 277 of this Act and in subdivision (i) of this section."

"(f) If any deficiency in any income, war-profits, or excess-profits tax imposed by * * * the Revenue Act of 1917, * * * was assessed before June 3, 1924, but was not paid in full before that date, and if the Commissioner after June 2, 1924, but before the enactment of this Act finally determined the amount of the deficiency, and if the person liable for such tax appealed before the enactment of this Act to the Board and the appeal is pending before the Board at the time of the enactment of this Act, the Board shall have jurisdiction of the appeal. In all such cases the powers, duties, rights, and privileges of the Commissioner and of the person who has brought the appeal, and

the jurisdiction of the Board and of the courts, shall be determined, and the computation of the tax shall be made, in the same manner as provided in subdivision (e) of this section, except as provided in subdivision (j) of this section and except that the person liable for the tax shall not be subject to the provisions of subdivision (d) of section 284."

"(1) In the case of any income, war-profits, or excess-profits tax imposed by prior Act of Congress, in computing the period of limitations provided in section 277 or 278 of this Act on the making of assessments and the beginning of distraint or a proceeding in court, the running of the statute of limitations shall be considered to have been suspended (in addition to the period of suspension provided for in subdivision [b] of section 277) for any period prior to the enactment of this Act during which the Commissioner was prohibited from making the assessment or beginning distraint or proceeding in court."

[fol. 42] Respondent contends: (1) that the waiver of December 10, 1923, although filed after the statute had run, is valid within § 250 (d) of the Revenue Act of 1921; (2) that by virtue of this waiver and that of October 25, 1924, the period for determination, assessment, and collection of the petitioner's taxes for the year 1917 was extended to December 10, 1925; (3) that the extension of time granted by § 277 (b) (2) and § 278 (d) of the Revenue Act of 1924 is applicable; (4) and that since the Act of 1926 was passed while petitioner's appeal was pending, the period for collection was also thereby extended until the decision of the Board should have become final.

(1) It is conceded that unless the right of collection has been kept alive by waivers and by the provisions of the Revenue Acts of 1924 and 1926, the collection of the unabated stipulated portion of the additional assessment for 1917 is now barred under § 250 (d) of the Revenue Act of 1921.

(2) We need not consider whether or not the unlimited waiver[2] of December 13, 1920, included collection, because in our judgment, the waiver of December 10, 1923, though given after the statute had run, was effective to revive the Government's right to assess and collect the taxes for 1917. Petitioner's argument that it was not, proceeds upon the double theory that § 250 (d) of the Act of 1921 necessarily requires that the waiver be signed before the statute has run, and that if the specified period has elapsed, the right as well as the remedy is extinguished. We find nothing in the text or content of § 250 (d) to require this construction. Statutes imposing limitations upon action by the United States are to be strictly construed in favor of the Government. United States v. Whited & Wheless, Ltd., 246 U. S. 552; Dupont de Nemours & Co. v. Davis, 264 U. S. 456. It is true that the section requires that the Commissioner also sign the waiver (Greylock Mills v. Commissioner, 31 F. [2d] [fol. 43] 655 [C. C. A. 2d]); and the Court of Appeals of the District of Columbia seems to be of the opinion that this precludes a waiver after the five years has run, on the theory that the Commissioner's consent would be but a futile gesture after his authority to collect the tax has ended. See Joy Floral Co. v. Commissioners, 29 F. (2d) 865.

The legislative purpose in requiring such consent is not apparent; if a contract is contemplated, it is difficult to see what consideration the Commissioner furnishes. See Greylock Mills v. Commissioner, 31 F. (2) 655, 657. Another reason, however, may be suggested. Oral waivers would have been subject to dispute and controversy as to form and meaning, and Congress made it clear that the taxpayer should not be bound except by a written waiver acceptable to the Commissioner. When a waiver is accepted, it is understood, if not impliedly agreed, that

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[2]This waiver would in any event have terminated on April 1, 1924, under the order of April 11, 1923, by which the Department ruled that all unlimited waivers should expire on April 1, 1924. Mim. 3085, Cum. Bull. I. R. II-1, p. 174; see Greylock Mills v. Commissioner, 31 F. (2d) 655, 657. Nevertheless, it would have sufficed to prevent the running of the statute until after the waiver of December 10, 1923, was filed.

proceedings for the collection of the tax will be suspended until intensive and thorough consideration of the taxpayer's claimed exemptions, valuations, and the like will have been made. his would frequently result in a delay of the assessment and collection until after the statutory period had run, and as an incident of orderly administrative procedure it was essential that the Commissioner have full knowledge of the action taken and, therefore, that such a waiver be not accepted indiscriminately by a Collector or revenue agent. This may well account for the statutory requirement that to be effective, the waiver be signed by the Commissioner. The time of his signature, however, was not vital; as recently stated by the Court of Claims, after a thorough examination of the contention that a prior signature was necessary, "to hold that the statute requires the Commissioner to consent to the waiver before the expiration of the period of limitations is to engraft upon the statute something which certainly is not contained within its provisions nor, as we think, is there any reason to infer that such was the intent of Congress." Stange v. United States, Ct. Clms., November 4, 1929, United States Daily, November 8, 1929, pp. 2262-63. See also Wells Bros. Co. v. Commissioner, 16 B. T. A. 79; Harris Co. v. Commissioner, 16 B. T. A. 469.

[fol. 44] The contention that the right as well as the remedy was barred and that consequently there was no consideration for petitioner's waiver cannot be accepted. This problem has recently arisen in connection with the asserted unconstitutionality of §§ 607 and 611 of the Revenue Act of 1928 (45 Stat. 874-75, 26 U. S. C. A. 2607, 2611) by which Congress in certain cases removed the bar of the statute after it had once fallen. It has been held in a number of cases that the bar imposed by § 250 (d) of the Act of 1918 (40 Stat. 1083) and similar provisions in other acts goes merely to the remedy and not to the right,[3]

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[3] This is perhaps confirmed by the fact that § 1106 (a) of the Revenue Act of 1926 (44 Stat. 113, 26 U. S. C. A. § 1249) specifically provided that the bar of the statute "shall not only operate to bar the remedy but shall extinguish the liability." This section, however, was repealed as of its effective date by § 612 of the Act of 1928. 45 Stat. 875.

and that the legislature which imposed the bar may remove it. Huntley v. Gile, 32 F. (2d) 857 (C. C. A. 9th); Wright & Taylor Co. v. Lucas, W. D. Ky., decided July 26, 1929; Regla Coal Co. v. Bowers, S. D. N. Y., decided by the writer, November 13, 1929. In any event, the bar of the remedy, provided by the ordinary statute of limitations, may be effectively waived without consideration. See Williston, Contracts, §§ 160-84.

(3) Petitioner's contention that the waivers of 1923 and 1924 include taxes due only under its return needs little discussion. The argument is that the language "due under any return made by or on behalf of said taxpayer" in the waiver limits the consent to a later determination, assessment, and collection of only such taxes as may have been shown to be due by that return. Petitioner's return for 1917 is not in evidence, and for aught that appears in the record before us, the tax here involved might have been assessed on the basis of information contained in the return, and would therefore be a tax due under that return. But aside from this possibility, we are clearly of the opinion that such a narrow construction of the waivers would not be warranted either by the instruments read as a whole or by the statute pursuant to which they were filed. The taxpayer is required to make a return so that the Commissioner may have the information necessary to [fol. 45] a correct determination of its tax liability, and if such information be incomplete, the Commissioner must supply the deficiency from other sources. Clearly, it is the entire tax liability to which the inquiry is directed; it is to determine this that the Commissioner accepts the waiver and delays assessment and collection. This broad purpose, implicit in the whole arrangement, is not to be thus restricted by a narrow construction of the phrase "due under any return" in this waiver.

(4) The series of waivers purported to extend the period for the determination, assessment, and collection of the 1917 tax to December 10, 1925, or for the period provided in § 277 (b) of the Revenue Act of 1924. On October 28, 1925, the Commisioner sent his notice of final determination, and on November 18, 1925, petitioner appealed to the Board of Tax Appeals. Since no proceeding to collect

these taxes was begun prior to December 10, 1925, the continuance of the right under this waiver depends upon the construction of § 277 (b) and related sections of the 1924 Act and/or § 283 (f) of the 1926 Act. Petitioner asserts that § 277 (b) of the 1924 Act relates only to the right of assessment and not to the right of collection; that because of its reference thereto in the waiver of October 25, 1924, that waiver is similarly limited.

Section 280 provides that if, after June 2, 1924, the Commissioner determines that an assessment of 1917 taxes, "whether as deficiency or as interest, penalty, or other addition to the tax," should be made, the other provisions of the Act of 1924 are applicable. Section 274 (a) provides for the appeal of such determination to the Board of Tax Appeals, and § 277 (b) extends the period during which such assessment may be made until after the final decision of the Board. Thereafter, § 278 (d) allows the Government six years in which to collect the assessment.

In Russell v. United States, 278 U. S. 181, it was held that the extension granted by § 278 was limited to cases in which the assessment in question had been made after June 2, 1924, the effective date of the 1924 Act. That was a case of a direct proceeding by the United States to collect taxes: it was not a case involving an appeal to the [fol. 46] Board of Tax Appeals. The opinion says of the Act of 1924, that

"It made provision for taxes thereafter to accrue; also for those already due. It distinguished between existing assessments and those which were to follow. It established a Board of Tax Appeals and gave the right of appeal thereto whenever thereafter the Commissioner should propose to assess for deficiency. * * * To secure proper action by the Board might require considerable time, and this was provided for by extending the limitation to six years after assessment. But the taxpayer was afforded protection against improper action by the Commissioner through an appeal before any assessment could be actually imposed—a new and valuable right."

If, in the instant case, the definite and final assessment of this deficiency tax was prior to June 2, 1904, then the Russell case governs it.

The assessment of March, 1923, was a jeopardy assessment to which petitioner immediately filed a claim in abatement. The final determination of this assessment and its collection would await the Commissioner's action on the claim for abatement, under the common practice (See H. R. Rep. No. 2, 70th Cong., 1st Sess., p. 34; H. R. Doc. No. 578, 69th Cong. 2d Sess., u. 3 et seq., cited it Regla Coal Co. v. Bowers, supra); that such was petitioner's understanding is shown by its petition to the Board of Tax Appeals in which it states that the deficiency letter of October 28, 1925, "evidences the final determination by the Commissioner of the 1917 deficiency." Had it not been so, petitioner would have had no right of appeal to the Board under § 280 of the Act of 1924; this requires a final determination, necessarily prior to final assessment. Cf. United States v. Board of Tax Appeals, 16 F. (2d) 337. The fact that the amount of the deficiency as finally determined was covered by the jeopardy assessment theretofore made, did not render it any the less a deficiency which the Commissioner on October 28, 1925, finally determined should be assessed. The Commissioner might have abated the former assessment in its entirety (as he [fol. 47] did in part) and in the absence of a written settlement have determined a new deficiency assessment at any time before December 10, 1925. See L. Loewy & Sons, Inc. v. Commissioner, 31 F. (2d) 652 (C. C. A. 2d); Holmquist v. Blair, 35 F. (2d) 10 (C. C. A. 8th). And such new determination would clearly fall within § 280 and § 274 (a). Petitioner availed itself of the provisions of the Act of 1924 for a review of the determination of its tax liability; it cannot now deny the applicability of related sections of that act. Accordingly, we conclude that since the deficiency determination of October 28, 1925, came within § 280, and was appealed under § 274 as being a determination before assessment, the extension of time granted by § 277 (b) and § 278 (d) has not expired.

(5) But assuming that the jeopardy assessment of March 5, 1923, was the only assessment, we are of the opinion that the period for collection was extended by § 283 (f) of the Act of 1926. That section specifically provides for a review by the Board of Tax Appeals, if an assessment was made "before June 3, 1924, but was not

paid in full before that date, and if the Commissioner after June 2, 1924, but before the enactment of this Act finally determined the amount of the deficiency, and if the person liable for such tax appealed before the enactment of this Act to the Board and the appeal is pending before the Board at the time of the enactment of this Act, the Board shall have jurisdiction of the appeal." Moreover in such case § 274 (a) provides (with exceptions not material to this discussion) that no distraint or proceeding for the collection of a deficiency shall be begun or prosecuted if a petition has been filed with the Board of Tax Appeals until the decision of the Board has become final. Furthermore, the beginning of such a proceeding or distraint during the time this prohibition is in force may be enjoined, contrary to the general rule. Peerless Woolen Mills v. Rose, 28 F. (2d) 661. Section 277 (b) provides that the running of the statute of limitations against the beginning of a proceeding for collection, as well as against the making of assessments, "shall [after the mailing of the necessary notice] be suspended for the period during which the Commissioner is prohibited from making the assessment [fol. 48] or beginning distraint, or a proceeding in court and for 60 days thereafter." See also Reg. 69, Art. 1232 and 1271.

Section 283 (1) provides that in the case of any tax imposed by a prior act, the running of the statute shall be considered to have been suspended (in addition to the period of suspension provided in § 277 [b] (for any period prior to the enactment of the Act of 1926 during which the Commissioner was prohibited from making an assessment or beginning distraint or proceeding in court.

In the case at bar, the petition to the Board of Tax Appeals was filed on November 18, 1925, before the expiration of the last waiver on December 10, 1925, and thus was pending before the Board on February 26, 1926, the date on which the Act of 1926 became effective. Consequently, § 283 (f) and related sections of that Act are fully applicable.

Petitioner insists, however, that both § 277 (b) and § 283 (f) of the Act of 1926 are limited by § 278 (e) of that Act. The latter section provides that "This section * * * shall not authorize the assessment * * * or collection

* * * (1) if at the time of the enactment of this Act [such proceeding] was barred * * * unless prior to the enactment of this Act the Commissioner and the taxpayer agreed in writing thereto, or (2) contrary to the provisions of subdivision (a) of section 274 of this Act" The argument is that since the last waiver by its terms expired on December 10, 1925, that is, prior to the effective date of the Act of 1926, this section bars collection. We cannot accept this interpretation. The authority for extending the time for collection under the facts of the case at bar is found in § 283 (f), and not in § 278; the prohibition in § 278 (e) however, is by its language clearly limited to assessments and collections authorized by that section, that is, by the preceding alphabetical subdivisions of § 278. Moreover, the latter part of § 278 (e) recognizes and indeed reinforces the prohibition against collection while a case is pending before the Board, contained in § 274 (a). (This § 274 [a] is incorporated by reference in § 283 [f] which authorizes collection in the present case. Cf. § 283 [f] and § 283 [e].) Obviously, then, the provisions of § 278 (e) were not intended to be inconsistent with § 274 [fol. 49] (a) or subdivisions (e) and (f) of § 283. If we are to accept petitioner's contention that § 278 (e) is inconsistent with the interpretation we have given § 283 (f), we must necessarily hold that § 278 (e) in effect nullifies the clear provisions of § 283 (f). Not only is there nothing in the statute to warrant this interpretation, but the interrelations of § 274 (e) and § 283 (f) makes the contrary clear.

Order reversed as to Brown Brothers Land & Lumber Company, and affirmed as to W. P. Brown & Sons Lumber Company.

[fol. 50] In United States Circuit Court of Appeals

Motion to Stay Mandate—Filed March 15, 1930

May it please the Court:

Your petitioner, W. P. Brown & Sons Lumber Company, respectfully presents this, its application for an order staying the issuance of the Mandate in the above entitled case, under the provisions of Section 8 (d) of the Act of Con-

gress of February 13, 1925, (U. S. Code, Title 28, Section 350), and in support thereof presents the following:

This petitioner is desirous of making application to the Supreme Court of the United States for the issuance of a writ of certiorari to review the judgement of the Court entered herein on Febrauary 21, 1930.

The Supreme Court has, on March 3, 1930, granted an application for writ of certiorari to review the judgment of the Court of Claims in Stange v. United States, decided November 4, 1929, relied upon by the Court; and also in Graham v. Goodcell, involving the same issue presented in Huntley v. Gile, 32 F. (2d) 857, also relied upon by the Court.

Petitioner further shows to the Court that the payment of the tax proposed against this petitioner is secured by a good and solvent bond filed with the United States Board of Tax Appeals at the time the appeal was taken to this Court.

Respectfully submitted, W. W. Spalding, Attorney for Petitioner, W. P. Brown & Sons Lumber Company, 1021 Tower Bldg., Washington, D. C.

[fol. 51] In United States Circuit Court of Appeals

Præcipe for Transcript—Filed March 15, 1930

To Clerk, United States Circuit Court of Appeals for the Sixth Circuit:

Please make up a certified record in the above case to be used by the petitioner, W. P. Brown & Sons Lumber Company, in an application to the Supreme Court of the United States for the issuance of a writ of certiorari to review the decision rendered herein on February 21, 1930, and include therein the following:

(1) Record heretofore printed and filed in this Court.
(2) Argument and submission.
(3) Opinion of this Court.
(4) Judgment of this Court.
(5) Stay of Mandate.
(6) This Designation.

W. W. Spalding, Attorney for Petitioner.

[fo. 52] In United States Circuit Court of Appeals

Order Staying Mandate—Filed March 17, 1930

Ordered, that motion to stay mandate herein pending application to the Supreme Court for writ of certiorari is hereby granted and the mandate is stayed for thirty days from this date,—provided that, if within such thirty days, the applicant shall file with the Clerk of this Court the certificate of the Clerk of the Supreme Court that the certiorari petition, record and brief have been filed and that proof by affidavit of notice thereof under paragraph 3 of rule 38 of the Supreme Court has been given, the stay shall continue until the final disposition of the case by the Supreme Court. Unless this condition is complied with within such thirty days or any extension thereof made by the Court or any judge thereof or, if the condition is complied with, then upon the filing of copy of an order denying the writ applied for, the mandate shall issue.

Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 53] Supreme Court of the United States

Order Allowing Certiorari—Filed June 2, 1930

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit is granted, the briefs and argument to be limited to the question of the validity and effect of the waivers.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on cover: File No. 35,026. U. S. Circuit Court of Appeals, Sixth Circuit. Term No. 115. W. P. Brown & Sons Lumber Company, Petitioner, vs. Commissioner of Internal Revenue. Petition for writ of certiorari and exhibit thereto. Filed May 14, 1930. File No. 35,026.

FILE COPY

FILED
MAY 14 1930
CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1929.

No. ~~895~~ 115

W. P. BROWN & SONS LUMBER COMPANY,
PETITIONER,

v.

COMMISSIONER OF INTERNAL REVENUE,
RESPONDENT.

PETITION FOR WRIT OF CERTIORARI.

BRIEF FOR PETITIONER ON PETITION FOR WRIT OF CERTIORARI.

W. W. SPALDING,
Tower Building, Washington, D. C.,
Counsel for Petitioner.

MASON, SPALDING & McATEE,
Washington, D. C.,
Of Counsel.

(35,026)

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1929.

No. 895

W. P. BROWN & SONS LUMBER COMPANY,
PETITIONER,

v.

COMMISSIONER OF INTERNAL REVENUE,
RESPONDENT.

PETITION FOR WRIT OF CERTIORARI.

To the Honorable the Chief Justice and Associated Justices of the Supreme Court of the United States:

The petitioner, W. P. Brown & Sons Lumber Company, Louisville, Kentucky, presents this its petition for a writ of certiorari to review the decree of the Circuit Court of Appeals for the Sixth Circuit, which affirmed the decision of the Board of Tax Appeals in the action of this petitioner against the Commissioner of Internal Revenue, No. 9218 of the records of the

Board of Tax Appeals. The opinion of the Circuit Court of Appeals for the Sixth Circuit in this action is reported in 38 Fed. (2d) 425, 431. It appears at pages 38-49 of the record.

This action involves the power of the Commissioner of Internal Revenue to collect from petitioner additional income-excess profits taxes for 1917 assessed by the Commissioner of Internal Revenue against petitioner on March 5, 1923. In its opinion, the Court below sets forth its findings of fact as well as its conclusions of law. The findings of fact stated in the opinion are accepted by petitioner.

Accompanying this petition is a certified transcript of the record below, consisting of pleadings, memorandum opinion of the Board of Tax Appeals, decree and opinion of the Circuit Court of Appeals, but not the evidence.

Summary of Matters Involved.

Petitioner, W. P. Brown & Sons Lumber Company, is a corporation organized under the laws of the State of Kentucky, having its principal office at Louisville, Kentucky.

On April 1, 1918, petitioner filed its income-excess profits tax return for 1917 with the Collector of Internal Revenue at Louisville, Kentucky. On March 5, 1923, the Commissioner of Internal Revenue made a deficiency assessment against petitioner for 1917. Against this additional assessment petitioner filed its claim for abatement later in March, 1923. On December 10, 1923, petitioner signed and delivered to the

Commissioner a waiver in which it consented "to a determination, assessment and collection of the amount of income, excess-profits or war-profits taxes due under any return * * * for the year 1917 * * *". By its terms this waiver expired on December 10, 1924. On October 25, 1924, petitioner signed and delivered to the Commissioner of Internal Revenue a similar waiver extending the period for determination, assessment and collection to "one year after the expiration of the statutory period of limitations within which assessment of taxes may be made for the year or years mentioned, or the statutory period of limitations as extended by Section 277 (*b*) of the Revenue Act of 1924, or by any waivers already on file with the Bureau". This waiver expired on December 10, 1925.

On October 28, 1925, respondent notified petitioner that its said abatement claim had been allowed in part and rejected in part. Being dissatisfied with such decision of respondent, petitioner, on November 18, 1925, prosecuted an appeal therefrom to the Board of Tax Appeals. The determination of the Board of Tax Appeals, made on August 10, 1928, was as follows (Rec. 19):

> "ORDERED, ADJUDGED AND DECIDED, That as to the petitioner, W. P. Brown & Sons Lumber Company, for 1917 there is a deficiency in payment of $3,498.27 * * *."

From such determination of the Board of Tax Appeals petitioner duly prosecuted an appeal to the Circuit Court of Appeals for the Sixth Circuit. On February 21, 1930, the Circuit Court of Appeals entered its

decree and filed its opinion affirming the determination of the Board of Tax Appeals that there was a deficiency in payment by petitioner for 1917 in the amount of $3,498.27.

Upon the hearing of this action in the Court below, petitioner presented the following contentions, among others:

1. That the waivers of December 10, 1923, and October 25, 1924, above mentioned, were invalid because they were given after the expiration of the statutory period for enforcing collection, *i. e.*, after the bar of the statute of limitations had fallen.

2. These waivers by their terms expired long prior to August 10, 1928, the date on which the order of final determination was entered by the Board of Tax Appeals herein. Sections 277-278 of the Revenue Act of 1924 and corresponding Sections of the Revenue Act of 1926 being inapplicable to the present case, collection of the alleged deficiency is now barred by the statute of limitations.

In its decision in this case the Circuit Court of Appeals for the Sixth Circuit denied each of the contentions so presented by petitioner. In so denying each of such contentions the Court below erred; and petitioner now submits the foregoing statement of its contentions and the action of the Court thereon as its assignment of error for purposes of this petition.

Reasons Relied on for the Allowance of the Writ of Certiorari.

The reasons for the granting of this application, relied on by petitioner, are these:

(*a*) The decision of the Circuit Court of Appeals for the Sixth Circuit, now sought to be reviewed, affirming the validity of the waivers given after the bar of the statute of limitations had become effective, is in conflict with the decision of the Court of Appeals of the District of Columbia in the case of the Joy Floral Company *v.* Commissioner, 29 Fed. (2d) 865. This conflict is recognized in the decision of the Court below in the present case. These two courts are immediately subordinate to this Court. Both have jurisdiction, in certain cases, of appeals in income-excess profits tax cases from decisions of the Board of Tax Appeals. Section 1002 of the Revenue Act of 1926.

(*b*) The decision of the Circuit Court of Appeals that such waivers are valid is also in conflict with the decision of the Circuit Court of Appeals for the Seventh Circuit in the case of Pictorial Printing Company *v.* Commissioner, 38 Fed. (2d) 563, decided February 28, 1930. The decision of the Pictorial Printing Company case was therefore decided subsequent to the decision sought to be reviewed in the present case.

(*c*) The decision of the Court below that the period for enforcing collection of any part of the assessment made against petitioner by respondent on March 5, 1923, is to be taken from Section 278 (*d*) of the Reve-

nue Act of 1924, conflicts with the principle of the decision of this Court in the case of Benjamin Russell *v.* United States, 278 U. S. 181.

(*d*) The decision of the Court below that the statutory period for enforcing collection of any part of such assessment may be taken from the Revenue Act of 1926 is in conflict with the underlying principle of the decisions of this Court that deny retroactive effect to taxing statutes in the absence of language susceptible of no other reasonable construction. See, for instance, Schwab *v.* Doyle, 258 U. S. 529.

(*e*) The decision of the Court below that the said waiver of October 25, 1924, is still in full force and effect is in conflict with the language of the waiver itself which by its terms expired on December 10, 1925.

(*f*) Petitioner believes, therefore, that the Court below, in petitioner's case, has decided an important question of general law in a way probably in conflict with the weight of authority; that the decision sought to be reviewed involves important questions of Federal law to be settled by an authoritative decision of this Court; and that the lower Court has decided Federal questions in a way probably in conflict with applicable decisions of this Court.

(*g*) The instant case involves questions of general public interest. Many waivers similar to these involved in the present case have been given to respondent by taxpayers. Some of these were given before and others after the expiration of the statutory period of limitation. A conflict of authority regarding the

validity and effect of such waivers is to be found in the decisions of Courts subordinate to this Court. Uncertainty now exists in the minds of taxpayers and officials regarding the rules to be applied in determining the validity and effect of such waivers. Such uncertainty extends even to the Congress of the United States, which is evident from the enactment of Section 506 of the Revenue Act of 1928. In fact, that Section undoubtedly contemplates that an authoritative ruling shall be made by the courts on the question of the validity of waivers given after the expiration of the statutory period of limitation. As conflict in the decisions of the courts immediately subordinate to this Court regarding the validity of waivers, given after the expiration of the statutory period, now exists, only by a decision of this Court of such question may an authoritative ruling be secured.

The premises considered, petitioner respectfully asks for the issuance of a writ of certiorari to review the decree of the Circuit Court of Appeals for the Sixth Circuit in petitioner's said case, and the entry of such orders as may be incidental to that relief.

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MASON, SPALDING & McATEE,
Of Counsel.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1929.

No. 895

W. P. BROWN & SONS LUMBER COMPANY,
PETITIONER,

v.

COMMISSIONER OF INTERNAL REVENUE,
RESPONDENT.

BRIEF FOR PETITIONER ON PETITION FOR WRIT OF CERTIORARI.

MAY IT PLEASE THE COURT:

We take the liberty of making the following suggestions in support of the petition for a writ of certiorari in the present case.

Opinion of the Court Below.

The opinion of the Court below was rendered by the Circuit Court of Appeals for the Sixth Circuit on

February 21, 1930, on the appeal of this petitioner to that Court. The opinion of the lower Court may be found in 38 Fed. (2d) 425. It also appears at pages 38-49 of the record.

Jurisdiction.

(*a*) The jurisdiction of this Court under Section 288 of the Judicial Code is invoked (28 U. S. C. A. 129). Subdivision (*b*) of that Section is as follows:

> "In any case in the Court of Claims, including those begun under Section 287, it shall be competent for the Supreme Court, upon the petition of either party, whether Government or claimant, to require, by certiorari, that the cause, including the findings of fact and the judgment or decree, but omitting the evidence, be certified to it for review and determination with the same power and authority, and with like effect, as if the cause had been brought there by appeal."

(*b*) The date of the decree of the Circuit Court of Appeals sought to be reviewed is February 21, 1930 (Rec. 37). The petition for certiorari was filed in this Court on May 14, 1930.

(*c*) This is an action originating in the United States Board of Tax Appeals involving the power of the Commissioner of Internal Revenue to collect additional income-excess profits taxes from this petitioner for 1917, such income-excess taxes having been assessed in March, 1923 (Rec. 3-5).

(*d*) The jurisdiction of this Court to review decisions of the Circuit Court of Appeals of the several

circuits is recognized in Rule 38 of the rules of this Court.

Statement of Case.

We adopt as a statement of the present case the summary of matters involved and the reasons relied on for the allowance of the writ of certiorari, appearing in the petition for writ of Certiorari in the present case.

Specification of Errors.

The Court below erred in finding and holding against petitioner on each of its contentions advanced in that Court, viz:

1. That the waivers of December 10, 1923, and October 25, 1924, were invalid because they were given after the expiration of the statutory period for enforcing collection, *i. e.*, after the bar of the statute of limitations had fallen.

2. These waivers by their terms expired long prior to August 10, 1928, the date on which the order of final determination was entered by the Board of Tax Appeals herein. Sections 277-278 of the Revenue Act of 1924 and corresponding sections of the Revenue Act of 1926 being inapplicable to the present case, collection of the alleged deficiency is now barred by the statute of limitations.

ARGUMENT.

Summary of Argument.

(*a*) The decision of the Circuit Court of Appeals for the Sixth Circuit, now sought to be reviewed, affirming the validity of the waivers given after the bar of the statute of limitations had become effective, is in conflict with the decision of the Court of Appeals of the District of Columbia in the case of the Joy Floral Company *v.* Commissioner, 29 Fed. (2d) 865. This conflict is recognized in the decision of the Court below in the present case. These two courts are immediately subordinate to this Court. Both have jurisdiction, in certain cases, of appeals in income-excess profits tax cases from decisions of the Board of Tax Appeals. Section 1002 of the Revenue Act of 1926.

(*b*) The decision of the Circuit Court of Appeals that such waivers are valid is also in conflict with the decision of the Circuit Court of Appeals for the Seventh Circuit in the case of Pictorial Printing Company *v.* Commissioner, 38 Fed. (2d) 563, decided February 28, 1930. The decision of the Pictorial Printing Company case was decided subsequent to the decision sought to be reviewed in the present case.

(*c*) The decision of the Court below that the period for enforcing collection of any part of the assessment made against petitioner by respondent on March 5, 1923, is to be taken from Section 278 (*d*) of the Revenue Act of 1924, conflicts with the principle of the

decision of this Court in the case of Benjamin Russell *v.* United States, 278 U. S. 181.

(*d*) The decision of the Court below that the statutory period for enforcing collection of any part of such assessment may be taken from the Revenue Act of 1926 is in conflict with the underlying principle of the decisions of this Court that deny retroactive effect to taxing statutes in the absence of language susceptible of no other reasonable construction. See, for instance, Schwab *v.* Doyle, 258 U. S. 529.

(*e*) The decision of the Court below that the said waiver of October 25, 1924, is still in full force and effect is in conflict with the language of the waiver itself which by its terms expired on December 10, 1925.

(*f*) Petitioner believes, therefore, that the Court below, in petitioner's case, has decided an important question of general law in a way probably in conflict with the weight of authority; that the decision sought to be reviewed involves important questions of Federal law to be settled by an authoritative decision of this Court; and that the lower Court has decided Federal questions in a way probably in conflict with applicable decisions of this Court.

(*g*) The instant case involves questions of general public interest. Many waivers similar to these involved in the present case have been given to respondent by taxpayers. Some of these were given before and others after the expiration of the statutory period of limitation. A conflict of authority regarding the validity and effect of such waivers is to be found in the

decisions of Courts subordinate to this Court. Uncertainty now exists in the minds of taxpayers and officials regarding the rules to be applied in determining the validity and effect of such waivers. Such uncertainty extends even to the Congress of the United States, which is evident from the enactment of Section 506 of the Revenue Act of 1928. In fact, that Section undoubtedly contemplates that an authoritative ruling shall be made by the courts on the question of the validity of waivers given after the expiration of the statutory period of limitation. As conflict in the decisions of the courts immediately subordinate to this Court regarding the validity of waivers, given after the expiration of the statutory period, now exists, only by a decision of this Court of such question may an authoritative ruling be secured.

The questions involved in paragraphs (*a*) and (*b*) above, relating to the validity of waivers given after the expiration of the statutory period of limitation, are similar to the question involved in the case of Charles H. Stange *v.* The United States, No. 554, of the present term of this Court, wherein a writ of certiorari to the Court of Claims was issued by this Court on March 3, 1920. The order in the Stange case contained this restrictive provision:

> "Counsel shall confine themselves in the briefs and in oral argument to the questions involving the validity and effect of the waiver of the statute of limitations executed in this cause."

We ask for nothing more on this application than a review of the validity and effect of the waivers involved in the present case.

Subsequent to the issuance of the writ in the Stange case, this Court issued a writ of certiorari in the case of Annette Aiken, adminx., *v.* Commissioner of Internal Revenue, No. 777 of the present term of this Court, wherein there was involved, also, the question of the validity of a waiver given after the expiration of the statutory period.

The other points presented above relate chiefly to the *effect* of the waiver of October 25, 1924. This waiver expired by its terms on December 10, 1925. Our view is that no provision of the Revenue Act of 1924 extended the period *for making collection of the tax*, in cases such as we have here. In saying this we have not overlooked Section 277 (*b*) of that Act. This section extends the period for making assessments, but not the period for enforcing collection.

Nor have we overlooked the limitation of six years after assessment, for enforcing collection, specified in Section 278 (*d*) of the 1924 Act. In the present case, the assessment was made in March, 1923, and therefore before the passage of the Revenue Act of 1924. Subdivision (*e*) of Section 278 expressly provides that that Section shall not "affect any assessment made * * * before the enactment of this Act"; and this provision was vitalized by this Court in the case of Russell *v.* United States, 278 U. S. 181.

One of the remaining questions is whether the Revenue Act of 1926 shall be given a retroactive effect, so

as to remove the bar of the statute fallen before its passage. The rule undoubtedly is that a taxing statute will not be construed to disturb rights fixed before its passage, unless the language used is susceptible of no other reasonable construction. Our view is that under this rule of construction the limitation provisions of the Revenue Act of 1926 have no application to the present case, where the collection period as extended by the waiver expired prior to its passage.

That the present case involves questions of general interest, of an important nature, we believe, will not be questioned.

For these reasons we respectfully request the issuance of the writ of certiorari in the present case.

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Washington, D. C.

MASON, SPALDING & McATEE,
Of Counsel.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1930.

No. 115

W. P. BROWN & SONS LUMBER COMPANY,
PETITIONER,

v.

COMMISSIONER OF INTERNAL REVENUE,
RESPONDENT.

BRIEF FOR PETITIONER.

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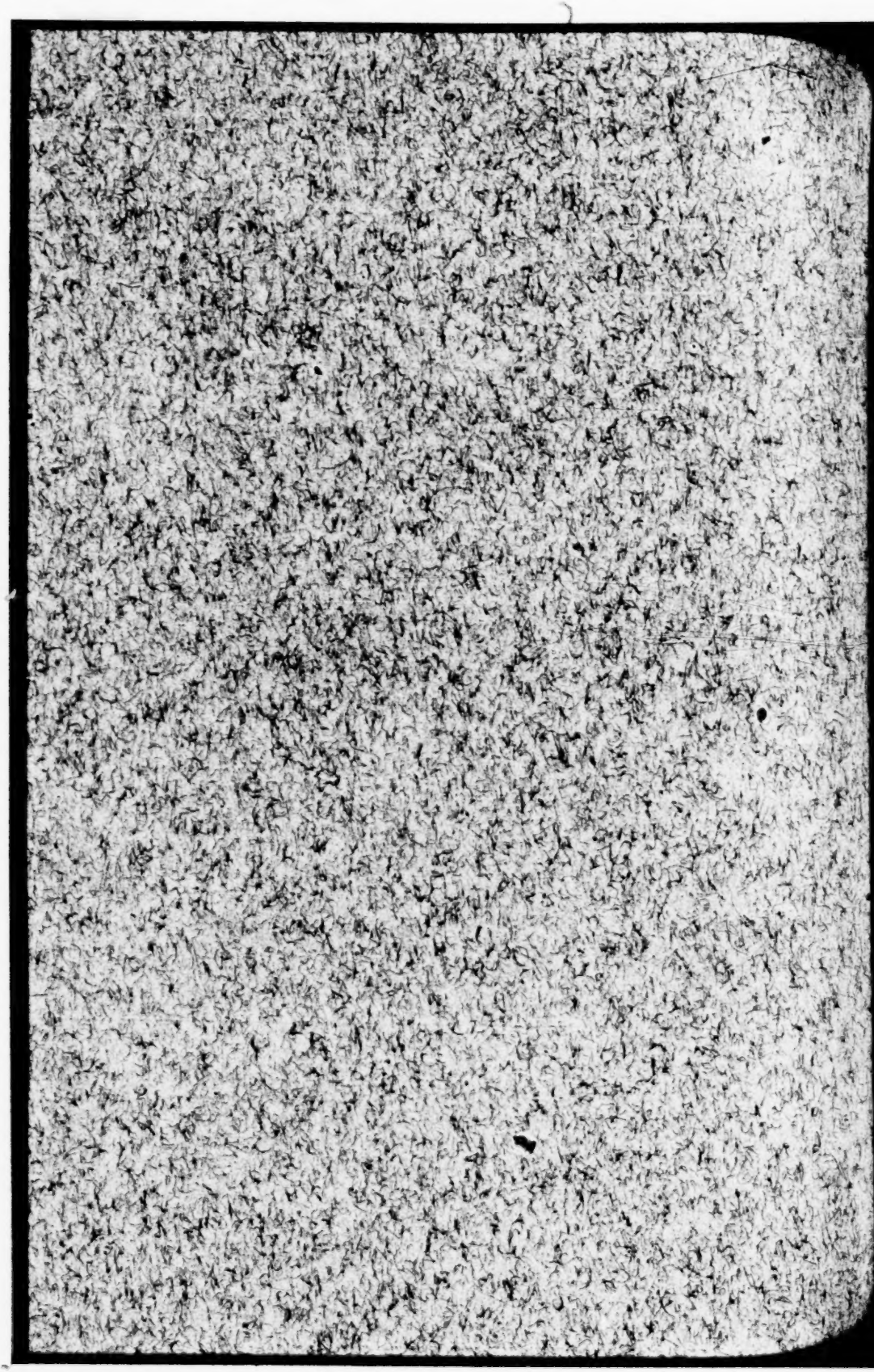

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1930.

No. 115

W. P. BROWN & SONS LUMBER COMPANY,
PETITIONER,

v.

COMMISSIONER OF INTERNAL REVENUE,
RESPONDENT.

BRIEF FOR PETITIONER.

MAY IT PLEASE THE COURT:

This is an appeal granted by this Court from a decision of the Circuit Court of Appeals, Sixth Circuit, holding petitioner to be liable for certain income taxes, for 1917, assessed against it by the Commissioner of Internal Revenue in March, 1923.

Unless otherwise indicated, the italics of this brief are ours.

Copies of the sections of the Revenue Acts involved on this appeal appear in the appendix of this brief.

Opinion of the Court Below.

The opinion of the Court below was rendered by the Circuit Court of Appeals, Sixth Circuit, on February 21, 1930. It is reported in 38 Fed. (2d) at page 425. It is a part of the record on this appeal (Rec. 36-50).

Jurisdiction.

This Court has heretofore granted a writ of certiorari under Section 240 of the Judicial Code as amended. That section provides (U. S. C. A., Title 28, Section 347):

> "In any case, civil or criminal, in a circuit court of appeals, or in the Court of Appeals of the District of Columbia, it shall be competent for the Supreme Court of the United States, upon the petition of any party thereto, whether Government or other litigant, to require by certiorari, either before or after a judgment or decree by such lower Court, that the cause be certified to the Supreme Court for determination by it with the same power and authority, and with like effect, as if the cause had been brought there by unrestricted writ of error or appeal."

This is an action, originating in the United States Board of Tax Appeals, involving the power of the Commissioner of Internal Revenue to collect additional income-excess profits taxes from this petitioner for 1917 (Rec. 6-12).

The jurisdiction of this Court to review decisions of the Circuit Courts of Appeals of the several Circuits is recognized in Rule 38 of the Rules of this Court.

Statement of the Case.

The 1917 income-excess profits tax return of the petitioner was filed on April 1, 1918 (Rec. 37).

In March, 1923, an additional assessment for 1917 was made by respondent against petitioner. The amount of this additional assessment was subsequently reduced by the Bureau of Internal Revenue and the Board of Tax Appeals to $3,498.27, the amount involved on the present appeal. No part of this amount has been paid.

An abatement claim was filed by petitioner with the Collector of Internal Revenue on March 27, 1923, against the additional assessment in question.

On October 28, 1925, a deficiency letter was mailed by respondent to petitioner, wherein a determination of its tax liability for 1917 was shown. This letter allows petitioner's abatement claim in part and rejects it in part.

On November 18, 1925, petitioner appealed from this determination to the Board of Tax Appeals. Upon final hearing the Board of Tax Appeals held that petitioner was liable for $3,498.27, the unabated portion of the amount assessed by respondent in March, 1923.

No proceeding in Court or by distraint has been instituted by respondent for the collection of such additional assessment, in whole or in part. As said by the lower Court (Rec. 43):

> "It is conceded that unless the right of collection has been kept alive by waivers and by the provisions of the Revenue Acts of 1924 and 1926, the collection of the unabated stipulated portion of the additional assessment for 1917 is now barred under Section 250(*d*) of the Revenue Act of 1921."

On December 13, 1920 petitioner filed with respondent a 1917 assessment waiver, unlimited as to time of expiration. On December 10, 1923, a waiver relating to determination, assessment, and collection of certain taxes for 1917 was filed by petitioner. The latter waiver expired according to its terms on December 10, 1924.

Finally, on October 25, 1924, petitioner filed with respondent a waiver relating to determination, assessment, and collection of certain taxes for the years 1917 to 1919, inclusive. Our view is that this waiver expired, according to its terms, on December 10, 1925.

The determination of the Board of Tax Appeals was entered on August 10, 1928, prior to which time no step had been taken by respondent looking to the collection of the 1917 additional taxes.

The three waivers above mentioned read as follows:

> "Received
> Dec. 13, 1920.
> Natural Resources
> Sub-Division.
>
> *Waiver.*
>
> W. P. Brown & Sons Lumber Company, a corporation, organized under the laws of the State

of Kentucky, in consideration of the assurance given it by officials of the Income Tax Unit of the Bureau of Internal Revenue that its liability for all Federal taxes imposed by the Act of Congress, approved September 8, 1916, as amended by the Act of Congress, approved October 3, 1917, for the year ended December 31, 1917, on its net income received from all sources in said year, shall not be determined except after deliberate, intensive and thorough consideration, hereby waives any and all statutory limitations as to the time within which assessments based upon such liability may be entered. It is understood, however, that the above corporation does not, by the execution of this waiver, admit in advance the correctness of any assessment which may be made against it for said year by the officials of the Income Tax Unit.

[SEAL.] W. P. BROWN & SONS LUMBER CO.,

(Signed) Per J. G. BROWN,
Pres. Corporation.

Approved Dec. 2, 1922.
(S.) D. H. BLAIR,
Commissioner of Internal Revenue."

"Received
Dec. 14, 1923,
Engineering Div.
Dec. 10th, 1923. (Date)

Income and Profits Tax Waiver

In pursuance of the provisions of subdivision (*d*) of Section 250 of the Revenue Act of 1921, W. P. Brown & Sons Lumber Company of Louisville, Kentucky, and the Commissioner of In-

ternal Revenue, hereby consent to a determination, assessment, and collection of the amount of income, excess-profits, or war-profits taxes due under any return made by or on behalf of the said * * * for the years 1917 and 1918, under the Revenue Act of 1921, or under prior income, excess-profits, or war-profits tax Acts, or under Section 38 of the Act entitled 'An Act to provide revenue, equalize duties, and encourage the industries of the United States, and for other purposes,' approved August 5, 1909. This waiver is in effect for one year from the date it is signed by the taxpayer.

[SEAL.] W. P. BROWN & SONS LUMBER CO.,
(Signed) By PRESTON P. JOYES,
Treas.

(Signed) D. H. BLAIR,
Commissioner.

Dec. 15, 1923.

If this waiver is executed on behalf of a corporation, it must be signed by such officer or officers of the corporation as are empowered under the law of the State in which the corporation is located to sign for the corporation, in addition to which, the seal, if any, of the corporation must be affixed."

"October 25, 1924.
(Date)

Income and Profits Tax Waiver.

In pursuance of the provision of existing Internal Revenue Laws, W. P. Brown & Sons Lumber Company, a taxpayer, of Louisville, Kentucky, and the Commissioner of Internal

Revenue, hereby consent to extend the period prescribed by law for a determination, assessment, and collection of the amount of income, excess-profits, or war-profits taxes due under any return made by or on behalf of said taxpayer for the years 1917, 1918 and 1919 under the Revenue Act of 1924 or under prior income, excess-profits, or war-profits tax acts, or under Section 38 of the Act entitled 'An Act to provide revenue, equalize duties, and encourage the industries of the United States, and for other purposes,' approved August 5, 1909. This waiver is in effect for a period of one year after the expiration of the statutory period of limitation within which assessments of taxes may be made for the year or years mentioned or the statutory period of limitations as extended by Section 277 (*b*) of the Revenue Act of 1924, or by any waivers already on file with the Bureau.

W. P. BROWN & SONS
LUMBER CO.,
(Signed) By J. G. BROWN,
Pres.

(Signed) D. H. BLAIR,
Commissioner.

(Received in Review Division Feb. 26, 1925, Solicitor's Office.)

Attest:
(Signed) LEROY OLCOTT,
[SEAL.] *Secretary.*

If this waiver is executed on behalf of a corporation, it must be signed by such officer or officers of the corporation as are empowered under the laws of the State in which the corporation is located to sign for the corporation, in ad-

dition to which, the seal, if any, of the corporation, must be affixed."

Specification of Errors.

The lower Court erred in its conclusions of law in the present case, as follows:

1. In holding valid the waiver of October 25, 1924, given after the expiration of the statutory period for collecting the additional assessment for 1917. The Revenue Acts of 1921 and 1924 contemplate that waivers shall be obtained by the Commissioner of Internal Revenue before the expiration of the statutory period.

2. In holding that the period for making collection of such taxes was extended by Sections 277 (*b*) and 278 (*d*) of the Revenue Act of 1924.

3. In holding that the period for collecting such taxes was extended by Section 283 (*c*) and (*f*) and related sections of the Revenue Act of 1926.

4. In holding that the power to collect such taxes existed on August 10, 1928, the date on which the Board of Tax Appeals entered its order of redetermination.

The waiver that influenced the decision of the lower Court is that of October 25, 1924. Our view is that this waiver is not effective here, for these reasons:

(*a*) Because it was invalid at all times, it and the only earlier collection waiver having been given after the bar of the statute of limitations had fallen.

(*b*) Because, as it affected the collection period, it expired according to its terms long before August 10, 1928, the date on which the Board of Tax Appeals entered its order of redetermination.

Our view, further, is that the period of limitation for collecting the taxes here involved was not extended by either the Revenue Act of 1924 or the Revenue Act of 1926.

The errors assigned will be considered in the order in which they have been stated.

ARGUMENT.

The Court below erred in holding valid the waiver of October 25, 1924, given after the expiration of the statutory period for collecting the additional assessment for 1917. The Revenue Acts of 1921 and 1924 contemplate that waivers shall be obtained by the Commissioner of Internal Revenue before the expiration of the statutory period.

The first waiver relating to the collection period was given by petitioner on December 10, 1923. As the return for 1917 was filed on April 1, 1918, the statutory period for collecting taxes for that year expired on April 1, 1923, five years after the date of the filing of the return. Section 250 (*d*) of the Revenue Act of 1921. It therefore appears that respondent's right of collection expired about eight months before the waiver of December 10, 1923, was given.

The immediate question—whether a waiver given after the bar of the statute had fallen is valid—is be-

fore this Court in the case of Charles H. Stange *v.* United States, appealed from the Court of Claims, being No. 554 of the October term, 1929. The question has been fully argued in that case; and the decision of the Court in that case will, we assume, be controlling of the question of the validity of the waiver in the present case.

If it be held that the collection waivers of December 10, 1923, and October 25, 1924, are invalid, it will follow that the decision of the lower Court should be reversed as no step looking to collection was taken prior to April 1, 1923, the date on which the statutory period of limitation expired.

In the remainder of this brief we shall assume, for purposes of the discussion, that the waivers in question are valid.

The Court below erred in holding that the period for making collection of the taxes involved in the present case was extended by Sections 277(b) and 278(d) of the Revenue Act of 1924.

Before entering upon a discussion of this proposition, we call attention to the dates of the expiration of the waivers of December 13, 1920, and December 10, 1923. The earlier of these was terminated on April 1, 1924, by respondent, by the issuance of Mim. 3085, reported at page 174 of Cumulative Bulletin of Internal Revenue Rulings, Vol. II-1. This mimeograph is as follows:

"TREASURY DEPARTMENT.

Office of Commissioner of Internal Revenue,

Washington, D. C.

APRIL 11, 1923.

Unlimited waivers for 1917 income taxes held to expire April 1, 1924.

To Collectors of Internal Revenue, Internal Revenue Agents in Charge, and Others Concerned:

The form of waiver now in use extends the time in which assessments of 1917 income and excess-profits taxes may be made to one year from the date of signing by the taxpayer. Inasmuch as there are many waivers on file signed by taxpayers containing no limitation as to the time in which assessments for 1917 may be made, all such unlimited waivers will be held to expire April 1, 1924.

D. H. BLAIR,
Commissioner."

The effective period of the waiver of December 10, 1923, is defined therein as follows: "This waiver is in effect for one year from the date it is signed by the taxpayer." Clearly, therefore, it expired December 10, 1924.

This leaves for consideration only the waiver of October 25, 1924, which defines its effective period as follows:

> "This waiver is in effect for a period of one year after the expiration of the statutory period

> of limitations within which assessments of taxes may be made for the year or years mentioned, or the statutory period of limitations as extended by Section 277(*b*) of the Revenue Act of 1924, or by any waivers already on file with the Bureau."

The last clause of the provision thus limits the effective period to one year after the statutory period of limitation as extended "by any waivers already on file with the Bureau." We have seen that the statutory period had previously been extended to December 10, 1924. The last clause of the waiver of October 25, 1924, therefore provided for an expiration date of December 10, 1925.

We come next to the clause, "the statutory period of limitation as extended by Section 277(*b*) of the Revenue Act of 1924." No other section or subdivision of any Revenue Act is referred to in the waiver.

The instrument under consideration relates not alone to *collection*, but also to *determination* and *assessment*, viz., to the three powers, stated separately; and it is perhaps not surprising that there should be found in the waiver provisions which are limited to the exercise of one as distinguished from the other two powers.

The section referred to in the waiver (Section 277(*b*) of the Revenue Act of 1924) provides:

> "The period within which *an assessment is required to be made* by subdivision (*a*) of this section in respect of any deficiency shall be extended (1) by 60 days if a notice of such deficiency has been mailed to the taxpayer under subdivision (*a*) of section 274 and no appeal

> has been filed with the Board of Tax Appeals, or, (2) if an appeal has been filed, then by the number of days between the date of the mailing of such notice and the date of the final decision by the Board."

While this subdivision is a part of a section that deals with collection as well as assessment, it is clearly limited by its terms to the exercise of the power to make the assessment. It does not undertake to extend the period of collection.

We suggest, therefore, that it will not avail respondent to point to the date on which the deficiency letter was mailed (October 28, 1925) or the date on which the petition was filed at the Board of Tax Appeals (November 18, 1925). The effect upon the limitation periods of the mailing of the deficiency letter and the pendency of the appeal at the Board of Tax Appeals is to be taken from the above-quoted provision of the 1924 Act. The statute is entirely clear on this point. Its effect is unmistakable. The mailing of the deficiency letter and the pendency of the appeal, under the very letter of the statute, served to extend the assessable period only. To construe the section to apply to the right of collection also, is to read something into it that Congress did not see fit to place there.

Section 278(*d*) of the Revenue Act of 1924 is also inapplicable to the present case. That subdivision allows six years after assessment in which to make collection. However, subdivision (*e*) of the same section provides that Section 278 shall not affect any assessment made before June 2, 1924, the date of the enactment of this Act. We need but recall that the assess-

ment here involved was made in March, 1923; and that the provision of subdivision (*e*) just referred to was vitalized by this Court in its decision in the case of Benjamin Russell *v.* United States, 278 U. S. 181. It was there held that in view of the language of subdivision (*e*), Section 278 had no application to an assessment made prior to the effective date of the Act of which it is a part.

It is conceded in the opinion below that "if, in the instant case, the definite and final assessment of this deficiency tax was prior to June 2, 1924, then the Russell case governs it."

The plain facts are these:

On March 5, 1923, respondent made a deficiency assessment against petitioner in the amount of $38,035.46. This is the allegation of respondent's answer filed at the Board of Tax Appeals (Rec. 15); and the fact that the assessment was made on *March 5, 1923*, is expressly recognized in the opinion below (Rec. 37).

Later in the same month (March, 1923) petitioner filed its abatement claim against the deficiency assessment so made against it (Rec. 11-37).

On October 28, 1925, respondent mailed to petitioner his letter of final determination. This letter is a part of the record on this appeal (Rec. 6-12). On page 11 of the record are shown, in the deficiency letter, the original assessment of April, 1918 ($16,690.25), and that of March, 1923 ($38,035.46). On the same page of the record it appears that the amount of the *over-assessment*, according to the deficiency letter, was $18,533.75; and it is added, "Claim for abatement in the amount of $38,035.46 filed March 27, 1923" (Rec. 11).

From this *determination* petitioner prosecuted an appeal to the Board of Tax Appeals, on November 18, 1925. It should be clearly understood that the appeal to the Board of Tax Appeals was prosecuted from the *determination*, not from the making of the assessment which antedated by more than a year the creation of the Board of Tax Appeals.

On August 10, 1928, the Board entered its final order wherein it was "Ordered, adjudged and decided that as to the petitioner, W. P. Brown & Sons Lumber Company, for 1917, there is a *deficiency in payment* of $3,498.27 and an *unpaid assessment to be abated* in the amount of $11,140.93" (Rec. 19). The items entering into the computation by which the *deficiency in payment* of $3,498.27 was arrived at appear at page 27 of the record.

It thus appears that an assessment of an amount largely excessive was made by respondent against petitioner long prior to June 2, 1924; that the steps subsequently taken had for their purpose and effect the material reduction of such assessment; and that respondent's final determination of the 1917 deficiency did not involve the making of any additional assessment after June 2, 1924, but rather the abating of a part of the assessment previously made.

This question naturally suggests itself: Why should respondent make an additional assessment, for 1917, against petitioner after June 2, 1924, when it affirmatively appeared that this taxpayer had previously been overassessed for that year?

The correctness of what has just been said is demonstrated by the text of the decision of the Board of Tax

Appeals. The Board held that there was a *deficiency in payment* (not of assessment) of a stated amount and, further, that there was an unpaid assessment to be abated in part. There was no cancellation of the entire assessment previously made. The Board did not make or order the making of a deficiency assessment of any amount against petitioner; and it is not contended that respondent has in fact made any deficiency assessment against petitioner, for 1917, since the date of the passage of the Revenue Act of 1924, whatever may be contended as to the effect of the *determination* of October 28, 1925.

The Court below, however, says in its opinion (Rec. 48):

> "The assessment of March, 1923 was a jeopardy assessment to which petitioner immediately filed a claim in abatement. The final determination of this assessment and its collection would await the Commissioner's action on the claim for abatement, under the common practice * * *; that such was petitioner's understanding is shown by its petition to the Board of Tax Appeals in which it states that the deficiency letter of October 28, 1925, 'evidences the final determination by the Commissioner of the 1917 deficiency.'"

Petitioner reiterates here what it said in its petition for the appeal to the Board of Tax Appeals, viz., that the letter of October 28, 1925, evidences a final *determination* by the Commissioner of the 1917 deficiency. In October, 1925, the Commissioner *determined* that there was a *deficiency in payment* of taxes

for 1917, a "deficiency" being the difference between the amount of the liability and the amount shown on the return. Section 273 of the Revenue Act of 1924. In some cases, this final determination would have been followed by the making of an assessment, but here it was found that the taxpayer had already been over-assessed. Certainly, in the present case, the determination of October 28, 1925, did not involve, *as a step to be taken subsequently*, the making of any assessment for 1917. This fact alone serves to take this case out of the scope of Section 277 (*b*) of the Revenue Act of 1924.

The opinion below continues (Rec. 48):

> "Had it not been so, petitioner would have had no right of appeal to the Board under Sec. 280 of the Act of 1924; this requires a final determination, necessarily prior to final assessment. * * * The fact that the amount of the deficiency as finally determined was covered by the jeopardy assessment theretofore made, did not render it any the less a deficiency which the Commissioner on October 28, 1925, finally determined should be assessed."

With all respect to the lower Court, we suggest that we have here a confusion of terms. It is hardly correct to say that the final determination must precede the assessment. The assessment often comes first, as it did in the present case, with a final determination later. Nor is it true that the Commissioner on October 28, 1925, finally determined that any amount *should be assessed*, although he determined on that date the

amount that *should have been assessed.* The determination of October 28, 1925, expressly states that petitioner had been previously overassessed, *i. e.*, by the assessment of March, 1923, in a stated amount; and as a matter of course no additional assessment was proposed by that determination. The appeal prosecuted by petitioner to the Board of Tax Appeals was from a notice of final determination, viz., from the final decision of the Commissioner upon the amount of the tax liability. Appeals are prosecuted from final decisions (not from assessments), and there is nothing in the procedure of appeals to the Board of Tax Appeals which departs from the general rule.

We see no escape from the conclusion that the decision of the Board is inconsistent with the opinion of this Court in Benjamin Russell *v.* United States, 278 U. S. 181. In that case this Court held broadly that Section 278 of the Revenue Act of 1924 was not applicable to assessments made before June 2, 1924. We ask for nothing more than the application of this rule to the present case.

Our conclusion, therefore, is that neither Section 277(*b*) nor Section 278(*d*) of the Revenue Act of 1924 extended the *period of collection* of the assessment here involved to any date later than December 10, 1925. It would follow that the power to collect such assessment, in whole or in part, expired long before the entry of the decision of either of the tribunals below.

The Court below erred in holding that the period for collecting such taxes was extended by Section 283(e) and (f) and related sections of the Revenue Act of 1926.

After holding that the period of limitation specfied in the waiver of October 25, 1924, had been extended by the Revenue Act of 1924, the Court below, going one step farther, held that the period of limitation was also extended by the Revenue Act of 1926. Said the Court (Rec. 48):

> "But, assuming that the jeopardy assessment of March 5, 1923 was the only assessment, we are of the opinion that the period for collection was extended by Section 283(*f*) of the Act of 1926 * * *."

It may not be inappropriate to recall at this time certain dates material to the present discussion, viz:

(*a*) The waiver was given on October 25, 1924.

(*b*) As it affected the collection period, it expired, according to its terms, on December 10, 1925.

(*c*) The Revenue Act of 1926 was enacted on February 26, 1926.

The waiver, therefore, expired prior to the passage and also prior to the effective date of the 1926 Act.

Section 283(*f*) of the 1926 Act, cited by the lower Court, follows:

> "If any deficiency in any income, war-profits, or excess-profits tax imposed by the Revenue Act of 1916, the Revenue Act of 1917, the Reve-

> nue Act of 1918, or the Revenue Act of 1921, or by any such Act as amended, was assessed before June 3, 1924, but was not paid in full before that date, and if the Commissioner after June 2, 1924, but before the enactment of this Act finally determined the amount of the deficiency, and if the person liable for such tax appealed before the enactment of this Act to the Board and the appeal is pending before the Board at the time of the enactment of this Act, the Board shall have jurisdiction of the appeal. In all such cases the powers, duties, rights, and privileges of the Commissioner and of the person who has brought the appeal, and the jurisdiction of the Board and of the courts, shall be determined, and the computation of the tax shall be made, in the same manner as provided in subdivision (*e*) of this section, except as provided in subdivision (*j*) of this section, and except that the person liable for the tax shall not be subject to the provisions of subdivision (*d*) of section 284."

Section 283(*j*) and Section 284(*d*) are without application to the present case. Subdivision (*e*) of Section 283 will be considered presently. What is the effect of Subdivision (*f*) of Section 283? Does it extend the statutory period of collection? Undoubtedly, the primary effect of the subdivision is to confirm the jurisdiction already assumed by the Board of Tax Appeals. Ormsby, McKnight, Mitchell, 1 B. T. A. 143; Boston Structural Steel Company, 1 B. T. A. 602; Buffalo Slag Company, 1. B. T. A. 749. The previous decisions of the Board upon the contested question of its jurisdiction of the class of cases described in Sub-

division (*f*)—the power to hear and decide such cases—thus received legislative approval.

There should be read and considered with this subdivision the following provision of Section 1000 of the same Act, which was amendatory of the 1924 Act:

> "If the assessment or collection of any tax is barred by any statute of limitations, the decision of the Board to that effect shall, for the purposes of this title and of the Revenue Act of 1926, be considered as its decision that there is no deficiency in respect of such tax."

We thus find express legislative authority for the proposition that the Board may decide there is no deficiency *in payment* because the *collection* of the tax was barred by the statute of limitations. The effect of the two subdivisions read together is therefore that the jurisdiction to hear and determine cases such as we have here extends to questions involving the statute of limitations fixing the collection period. But we fail to find in either subdivision any provision which serves to extend the period of limitation fixed by earlier statutes.

Section 283(*e*), referred to in Subdivision (*f*), follows:

> "If any deficiency in any income, war-profits, or excess-profits tax imposed by the Revenue Act of 1916, the Revenue Act of 1917, the Revenue Act of 1918, or the Revenue Act of 1921, or by any such Act as amended, was assessed before June 3, 1924, but was not paid in full before the date of the enactment of this Act, and if the Commissioner, after the enactment of this

> Act, finally determines the amount of the deficiency, he is authorized to send by registered mail to the person liable for such tax notice of such deficiency, which notice shall, for the purposes of this act, be considered a notice under subdivision (*a*) of section 274 of this Act. In the case of any such final determination the amount of the tax (whether deficiency or interest, penalty, or other addition to the tax) shall, except as provided in subdivision (*h*) of this section, be computed as if this Act had not been enacted, but the amount so computed shall be collected and paid in the same manner and subject to the same provisions and limitations (including the provisions in case of delinquency in payment after notice and demand, and the provisions relating to claims and suits for refund) as in the case of a deficiency in the tax imposed by this title, except as otherwise provided in section 277 of this Act and in subdivision (*i*) of this section."

Section 277 (*a*) relates to the assessable period and to the period for enforcing collection by suit. Subdivision (*b*) of that section provides:

> "The running of the statute of limitations provided in this section or in section 278 on the making of assessments and the beginning of distraint or a proceeding in court for collection, in respect of any deficiency, shall (after the mailing of a notice under subdivision (*a*) of section 274) be suspended for the period during which the Commissioner is prohibited from making the assessment or beginning distraint or a proceeding in court, and for 60 days thereafter."

Nothing in this subdivision or in section 283 (*e*) indicates that their provisions should be given a retroactive effect *as to the period during which the running of the statute of limitations is to be suspended.* The natural construction is that their provisions are applicable to taxes not barred at the date of their enactment and that the period of suspension referred to is one that follows the enactment of the Act of which they are a part. The Courts have always been averse to the retroactive construction of a statute unless the declaration of retroactivity be "clear, strong, and imperative". United States *v.* Heth, 3 Cranch 298, 413, cited with approval in Shwab *v.* Doyle, 258 U. S. 529. Statutes will not be given a retroactive effect, in the absence of a declaration of retroactivity of this sort, where the effect of such a construction is to impair rights fixed prior to the enactment of the statute. It has been said, in substance, by this Court that the principles of our jurisprudence are repellant to a construction of a statute which will destroy retroactively rights legally acquired prior to its enactment. Ibanez de Aldecoa *v.* Hongkong Bkg. Corp., 246 U. S. 621; Cameron *v.* United States, 231 U. S. 710; Shwab *v.* Doyle, 258 U. S. 529; Llewellyn *v.* Frick, 268 U. S. 250.

The limitation period for collection after assessment, carried in the 1926 Act, is to be found in Section 278 (*d*), which fixes a period of six years after assessment, consistently with the same numbered section of the 1924 Act. Subdivision (*e*) of Section 278 of the 1926 Act, however, provides that the section will not authorize the collection of a tax, "if at the time of

the enactment of this Act such * * * proceeding was barred by the statutory period of limitation properly applicable thereto, unless prior to the enactment of this Act the Commissioner and the taxpayer agreed in writing thereto".

The preceding portion of this sentence refers to proceedings begun before June 2, 1924; and it is entirely clear that the collection proceeding referred to in the quoted provision is one that is to begin after the passage of the Act. The excepting clause requires a written agreement "thereto" between the Commissioner and the taxpayer. When read in connection with the text of the entire subdivision, this can mean nothing other than that, to make the excepting clause applicable, the Commissioner and the taxpayer must have agreed in writing to the collection of the tax at some time after February 26, 1926, the date of the enactment of the Act—which they did not do in the present case. This construction, it is to be noted, is in complete harmony with the rule against retroactive application referred to above.

Referring to Section 283 (1), the Court below said (Rec. 49):

> "Section 283 (1) provides that in the case of any tax imposed by a prior Act, the running of the statute shall be considered to have been suspended (in addition to the period of suspension provided in Section 277 (*b*)) for any period prior to the enactment of the Act of 1926, during which the Commissioner was prohibited from making an assessment or beginning distraint or proceeding in Court."

For no period of time, not even for a day, prior to the enactment of the 1926 Act, was the Commissioner prohibited from "beginning distraint or proceeding in Court", in the present case. Under the 1924 Act and earlier Revenue Acts, no inhibition on collection followed the mailing of a deficiency notice or the making of a deficiency assessment. Section 274 of the Revenue Act of 1924. The inhibition of this character did not come until the enactment of the 1926 Act. Section 274 of the Revenue Act of 1926. In view of the language of the regulations it will not be contended, we assume, that any such inhibition resulted from the filing of the abatement claim. Article 1032 of Regulations 62, in effect when the abatement claim was filed in this case, provides:

> "The filing of a claim for abatement does not necessarily operate as a suspension of the collection of the tax or make it any less the duty of the Collector to exercise due diligence to prevent the collection of the tax being jeopardized. He should, if he considers it necessary, collect the tax and leave the taxpayer to his remedy by a claim for refund."

Our general conclusion is that no provision of the 1926 Act, when properly construed, serves to extend the statutory period for making collection defined in earlier Acts or the period of its effectiveness so clearly defined in the waiver of October 25, 1924.

The waiver of October 25, 1924, having expired on December 10, 1925, the power to collect the tax here involved was lost prior to August 10, 1928, the date on which the order of redetermination was entered by the Board of Tax Appeals.

The assessment here involved was made under Section 250 (*d*) of the Revenue Act of 1921. That subdivision provides, in part:

> "The amount of income, excess-profits, or war-profits taxes due under any return made under this Act for the taxable year 1921 or succeeding taxable years shall be determined and assessed by the Commissioner within four years after the return was filed, and the amount of any such taxes due under any return made under this Act for prior taxable years or under prior income, excess-profits, or war-profits tax Acts, or under Section 38 of the Act entitled 'An Act to provide revenue, equalize duties, and encourage the industries of the United States, and for other purposes', approved August 5, 1909, shall be determined and assessed within five years after the return was filed, unless both the Commissioner and the taxpayer consent in writing to a later determination, assessment, and collection of the tax; and no suit or proceeding for the collection of any such taxes due under this Act, or under prior income, excess-profits, or war-profits tax Acts, or of any taxes due under section 38 of such Act of August 5, 1909, shall be begun, after the expiration of five years after the date when such return was filed, but this shall not affect suits or proceedings begun at the time of the passage of this Act."

As the 1917 return was filed on April 1, 1918, the statutory period for collection terminated on April 1, 1923. However, the waivers given by petitioner served to extend the period to December 10, 1925. We have seen that the Revenue Acts of 1924 and 1926 are without application to the present case. From what source, then, was derived the power to collect found by the Board of Tax Appeals to have been still in existence on August 10, 1928?

Our view is that this proposition follows as a matter of course from the conclusions reached in this brief. We have seen that the jurisdiction to enter a finding of no deficiency on the ground that the collection of the tax was barred by the statute has been expressly conferred upon the Board of Tax Appeals. Section 1000 of the Revenue Act of 1926. The failure of the Board to so find is the error complained of on this appeal.

We do not know to what extent the Court below was influenced by its conception of the rule of construction applicable to limitation provisions of taxing statutes. Referring to a contention presented by petitioner, the lower Court said (Rec. 44):

> "We find nothing in the text or content of Section 250 (*d*) to require this construction. Statutes imposing limitations upon action by the United States are to be strictly construed in favor of the Government."

In the case of United States *v.* Updike, 281 U. S. 489, 496, decided May 19, 1930, this Court held:

> "It may be that the saving clause was not strictly necessary, but was inserted from excessive care to put the right of the taxpayer beyond dispute. In any event, we think this is the fair interpretation of the clause, and the one which must be accepted, especially in view of the rule which requires taxing acts, *including provisions of limitation embodied therein*, to be construed liberally in favor of the taxpayer. Bowers *v.* New York & Albany Lighterage Company, 273 U. S. 346, 349."

For these reasons, a reversal of the decision of the Circuit Court of Appeals, Sixth Circuit, is respectfully requested.

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APPENDIX.

Revenue Act of 1921, 42 Stat. at L. 227-264.

SEC. 250 (*d*). The amount of income, excess-profits, or war-profits taxes due under any return made under this Act for the taxable year 1921 or succeeding taxable years shall be determined and assessed by the Commissioner within four years after the return was filed, and the amount of any such taxes due under any return made under this Act for prior taxable years or under prior income, excess-profits, or war-profits tax Acts, or under Section 38 of the Act entitled "An Act to provide revenue, equalize duties, and encourage the industries of the United States, and for other purposes", approved August 5, 1909, shall be determined and assessed within five years after the return was filed, unless both the Commissioner and the taxpayer consent in writing to a later determination, assessment, and collection of the tax; and no suit or proceeding for the collection of any such taxes due under this Act or under prior income, excess-profits, or war-profits tax Acts, or of any taxes due under section 38 of such Act of August 5, 1909, shall be begun, after the expiration of five years after the date when such return was filed, but this shall not affect suits or proceedings begun at the time of the passage of this Act.

Revenue Act of 1924, 43 Stat. at L. 253-297.

SEC. 273. As used in this title the term "deficiency" means—

(1) The amount by which the tax imposed by this title exceeds the amount shown as the tax by the taxpayer upon his return; but the amount so shown on the return shall first be increased by the amounts pre-

viously assessed (or collected without assessment) as a deficiency, and decreased by the amounts previously abated, credited, refunded, or otherwise repaid in respect of such tax.

SEC. 274. (*a*) If, in the case of any taxpayer, the Commissioner determines that there is a deficiency in respect of the tax imposed by this title, the taxpayer, except as provided in subdivision (*d*), shall be notified of such deficiency by registered mail, but such deficiency shall be assessed only as hereinafter provided. Within 60 days after such notice is mailed the taxpayer may file an appeal with the Board of Tax Appeals established by Section 900.

SEC. 274. (*b*). If the Board determines that there is a deficiency, the amount so determined shall be assessed and shall be paid upon notice and demand from the collector. No part of the amount determined as a deficiency by the Commissioner but disallowed as such by the Board shall be assessed, but a proceeding in court may be begun, without assessment, for the collection of any part of the amount so disallowed. The court shall include in its judgment interest upon the amount thereof at the rate of 6 per centum per annum from the date prescribed for the payment of the tax to the date of the judgment. Such proceeding shall be begun within one year after the final decision of the Board, and may be begun within such year even though the period of limitation prescribed in section 277 has expired.

SEC. 277. (*b*) The period within which an assessment is required to be made by subdivision (*a*) of this section in respect to any deficiency shall be extended (1) by 60 days if a notice of such deficiency has been mailed to the taxpayer under subdivision (*a*) of section 274 and no appeal has been filed with the Board of Tax Appeals, or, (2) if an appeal has been filed,

then by the number of days between the date of the mailing of such notice and the date of the final decision by the Board.

SEC. 278. (*d*) Where the assessment of the tax is made within the period prescribed in section 277 or in this section, such tax may be collected by distraint or by a proceeding in court, begun within six years after the assessment of the tax. Nothing in this Act shall be construed as preventing the beginning, without assessment, of a proceeding in court for the collection of the tax at any time before the expiration of the period within which an assessment may be made.

SEC. 278. (*e*) This section shall not (1) authorize the assessment of a tax or the collection thereof by distraint or by a proceeding in court if at the time of the enactment of this Act such assessment, distraint, or proceeding was barred by the period of limitation then in existence, or (2) affect any assessment made, or distraint or proceeding in court begun, before the enactment of this Act.

Revenue Act of 1926, 44 Stat. at L. 9-55.

SEC. 274. (*a*) If in the case of any taxpayer, the Commissioner determines that there is a deficiency in respect of the tax imposed by this title, the Commissioner is authorized to send notice of such deficiency to the taxpayer by registered mail. Within 60 days after such notice is mailed (not counting Sunday as the sixtieth day), the taxpayer may file a petition with the Board of Tax Appeals for a redetermination of the deficiency. Except as otherwise provided in subdivision (*d*) or (*f*) of this section or in section 279, 282, or 1001, no assessment of a deficiency in respect of the tax imposed by this title and no distraint or proceeding in court for its collection shall be made, begun, or

prosecuted until such notice has been mailed to the taxpayer, nor until the expiration of such 60-day period, nor, if a petition has been filed with the Board, until the decision of the Board has become final. Notwithstanding the provisions of section 3224 of the Revised Statutes the making of such assessment or the beginning of such proceeding or distraint during the time such prohibition is in force may be enjoined by a proceeding in the proper court.

SEC. 277. (*b*) The running of the statute of limitations provided in this section or in section 278 on the making of assessments and the beginning of distraint or a proceeding in court for collection, in respect of any deficiency, shall (after the mailing of a notice under subdivision (*a*) of section 274) be suspended for the period during which the Commissioner is prohibited from making the assessment or beginning distraint or a proceeding in court, and for sixty days thereafter.

SEC. 278. (*d*) Where the assessment of any income, excess-profits, or war-profits tax imposed by this title or by prior Act of Congress has been made (whether before or after the enactment of this Act) within the statutory period of limitation properly applicable thereto, such tax may be collected by distraint or by a proceeding in court (begun before or after the enactment of this Act) but only if begun (1) within six years after the assessment of the tax, or (2) prior to the expiration of any period for collection agreed upon in writing by the Commissioner and the taxpayer.

SEC. 278. (*e*) This section shall not bar a distraint or proceeding in court begun before the enactment of the Revenue Act of 1924; nor shall it authorize the assessment of a tax or the collection thereof by distraint or by proceeding in court (1) if at the time of

the enactment of this Act such assessment, distraint or proceeding was barred by the statutory period of limitation properly applicable thereto, unless prior to the enactment of this Act the Commissioner and the taxpayer agreed in writing thereto, or (2) contrary to the provisions of subdivision (*a*) of Section 274 of this Act.

SEC. 283. (*e*) If any deficiency in any income, war-profits, or excess-profits tax imposed by the Revenue Act of 1916, the Revenue Act of 1917, the Revenue Act of 1918, or the Revenue Act of 1921, or by any such Act as amended, was assessed before June 3, 1924, but was not paid in full before the date of the enactment of this Act, and if the Commissioner, after the enactment of this Act, finally determines the amount of the deficiency, he is authorized to send by registered mail to the person liable for such tax notice of such deficiency, which notice shall, for the purposes of this Act, be considered a notice under subdivision (*a*) of section 274 of this Act. In the case of any such final determination the amount of the tax (whether deficiency or interest, penalty, or other addition to the tax) shall, except as provided in subdivision (*b*) of this section, be computed as if this Act had not been enacted, but the amount so computed shall be collected and paid in the same manner and subject to the same provisions and limitations (including the provisions in case of delinquency in payment after notice and demand, and the provisions relating to claims and suits for refund) as in the case of a deficiency in the tax imposed by this title, except as otherwise provided in section 277 of this Act and in subdivision (*i*) of this section.

SEC. 283. (*f*) If any deficiency in any income, war-profits, or excess-profits tax imposed by the Revenue Act of 1916, the Revenue Act of 1917, the Revenue Act of 1918, or the Revenue Act of 1921, or by any such

Act as amended, was assessed before June 3, 1924, but was not paid in full before that date, and if the Commissioner after June 2, 1924, but before the enactment of this Act finally determined the amount of the deficiency, and if the person liable for such tax appealed before the enactment of this Act to the Board and the appeal is pending before the Board at the time of the enactment of this Act, the Board shall have jurisdiction of the appeal. In all such cases the powers, duties, rights and privileges of the Commissioner and of the person who has brought the appeal, and the jurisdiction of the Board and of the courts, shall be determined, and the computation of the tax shall be made, in the same manner as provided in subdivision (*c*) of this section, except as provided in subdivision (*j*) of this section and except that the person liable for the tax shall not be subject to the provisions of subdivision (*d*) of section 284.

SEC. 283. (1) In the case of any income, war-profits, or excess-profits tax imposed by prior Act of Congress, in computing the period of limitations provided in section 277 or 278 of this Act on the making of assessments and the beginning of distraint or a proceeding in court, the running of the statute of limitations shall be considered to have been suspended (in addition to the period of suspension provided for in subdivision (*b*) of section 277) for any period prior to the enactment of this Act during which the Commissioner was prohibited from making the assessment or beginning distraint or proceeding in court.

SEC. 1000. If the assessment or collection of any tax is barred by any statute of limitations, the decision of the Board to that effect shall, for the purposes of this title and of the Revenue Act of 1926, be considered as its decision that there is no deficiency in respect of such tax.

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CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1930.

No. 115

W. P. BROWN & SONS LUMBER COMPANY,
PETITIONER,

v.

COMMISSIONER OF INTERNAL REVENUE,
RESPONDENT.

REPLY BRIEF FOR PETITIONER.

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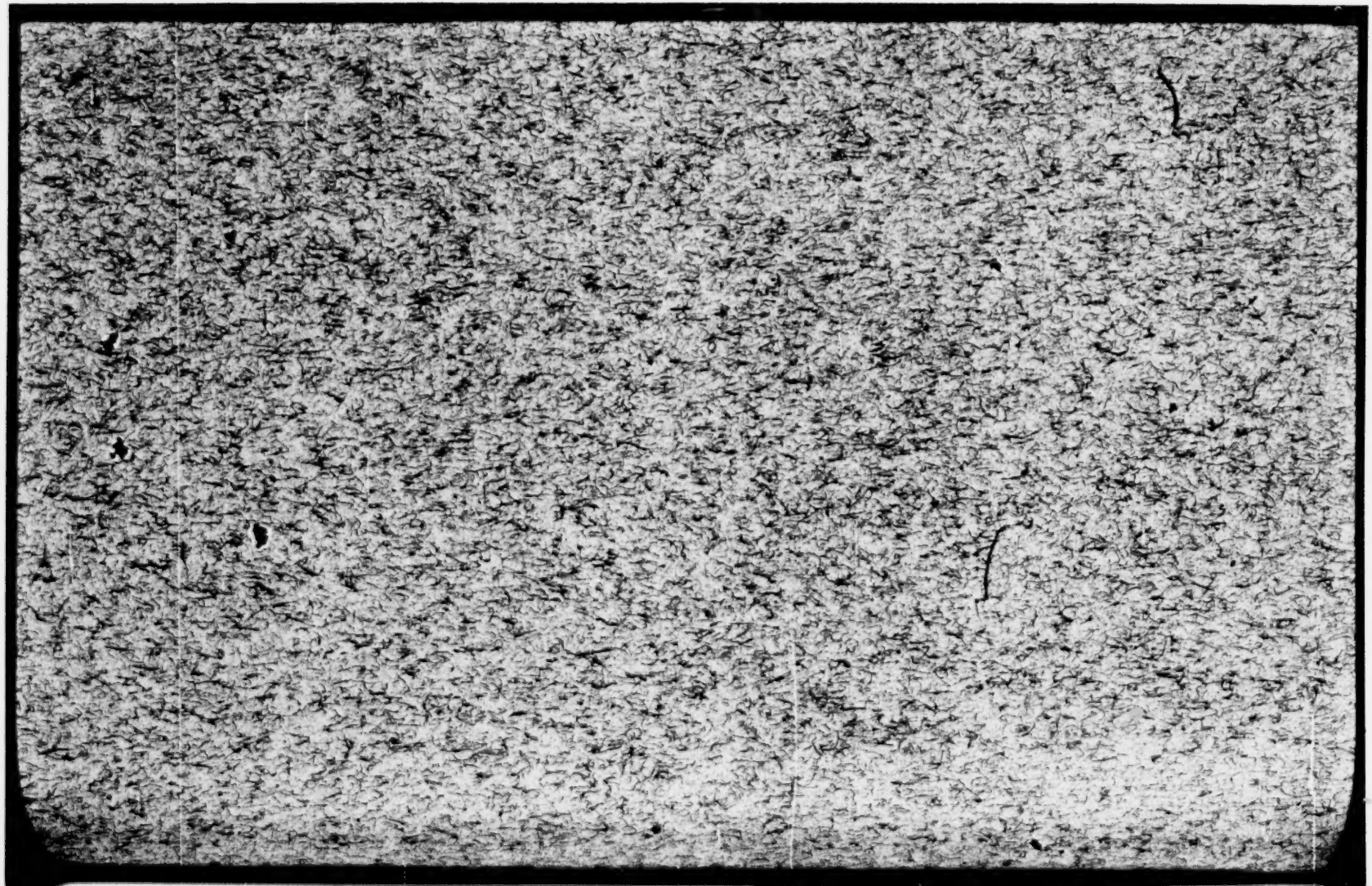
Washington, D. C.,
Of Counsel.



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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1930.

No. 115

W. P. BROWN & SONS LUMBER COMPANY,
PETITIONER,

v.

COMMISSIONER OF INTERNAL REVENUE,
RESPONDENT.

REPLY BRIEF FOR PETITIONER.

MAY IT PLEASE THE COURT:

We take the liberty of submitting these suggestions by way of reply to the brief for respondent.

Counsel for petitioner has not discussed questions outside of the scope of the review as limited by the order of this Court.

It is contended in the brief for respondent that certain statutes extended the collection period which, as

we view this case, expired December 10, 1925. In this connection, the brief for respondent states:

> "A large part of the opinion of the Court below was concerned with this question, which, in the view taken by that Court, was not at all dependent upon the effect of the waivers. As the order of this Court limited the briefs and arguments to a discussion of the validity and effect of the waivers, we submit that the question of the effect of these statutes is not now open to review, and that petitioner is bound by the conclusions of the Court below."

The fact that the waiver of October 25, 1924, specified Section 277(*b*) of the Revenue Act of 1924 made necessary a discussion in our brief of that and related sections of the same act.

The limitation period for collection in the Revenue Act of 1926 (44 Stats. 9-55) is to be found in Section 278. Subdivision (*d*) of that section as amended provides for collection by "distraint or by a proceeding in Court, if begun prior to the expiration of any period for collection agreed upon in writing between the Commissioner and the taxpayer before the expiration of such six-year period". Cf. Section 506 of the Revenue Act of 1928 (45 Stats. 870). Subdivision (*e*) of this section provides that that section did not authorize the collection of any tax "barred by the statutory period of limitation properly applicable thereto unless prior to the enactment of this act the Commissioner and the taxpayer agreed in writing thereto".

The "writing" referred to in these sections is the form of agreement that is known in this record and in

the order granting the writ of certiorari as a "waiver". These provisions of the 1926 Act made it incumbent on counsel for petitioner to discuss that act also in connection with the waiver of October 25, 1924.

The order granting the writ served to distinguish between two discussions, viz., (*a*) that relating to the merits of the tax itself, which has not been discussed in petitioner's brief, and (*b*) that relating to the validity and effect of the waivers. Waivers relate to periods of limitation of time for assessment and/or collection of taxes. To discuss the effect of the waiver, one must discuss the applicable limitation statutes—not alone those believed by counsel to be in force and the application of whose provisions may be affected by the waiver, but also those believed by counsel to be inapplicable because, for instance, the waiver was not in force at the time of their enactment. Certainly, it was not intended that counsel should be precluded by the order from contending that the ultimate date specified in the waiver for assessment or collection was not affected by statutes then existing or subsequently enacted. Such a contention goes directly to the question of the *effect* of the waiver.

To us it seems clear that the waiver of October 25, 1924, which alone influenced the decision of the lower Court, expired according to its terms on December 10, 1925; and one of the questions we have here is whether the Revenue Act of 1924 at this point intervened, and whether later the Revenue Act of 1926 intervened, to extend the collection period to a date after August 10, 1928, that being the date on which the Board of Tax Appeals determined the deficiency in payment.

The lower Court, after holding the waivers valid, held that in view of their provisions the collection of the tax was not barred under the Revenue Acts of 1924 and 1926. Our contention is precisely the contrary. This being true, how else could we discuss the *effect* of the waiver under the 1924 and 1926 Acts except as we did?

If the question of the validity of the waiver should be decided adversely to petitioner, what would be accomplished by a decision, favorable to petitioner, that the ultimate date for collection under the waiver was December 10, 1925, if indeed the limitation period was extended by the Revenue Act of 1924 or that of 1926? It was not intended by the Court that the discussion should thus be confined to a question that would become moot if the lower Court was correct in its construction of the Revenue Acts of 1924 and 1926.

In the case of Florsheim Brothers Dry Goods Company *v.* United States, 280 U. S. 453, this Court had before it the question of the effect of a waiver *given before assessment*. In the opinion in that case, this Court, as a matter of course, considered and decided the effect of all applicable statutes. The question presented for decision was thus stated by the Court: "The claim that even if the assessment was timely the collection was barred, depends upon the effect of the 'Income and Profits Tax Waiver' and the applicability of the Revenue Acts of 1924 and 1926."

The *effect* of a waiver must be determined in any case in the light of applicable statutes.

The case of Florsheim Brothers Dry Goods Company v. United States, 280 U. S. 453, was distinguished in the decision from the class of cases we have here.

We take the following from the brief for respondent:

> "The contention of the petitioner that its tax liability has ended because the Revenue Acts of 1924 and 1926 did not serve to extend the period of collection which had not expired at the time of their enactment, was disposed of by this Court in the case of Florsheim Brothers Dry Goods Company *v.* United States, 280 U. S. 453."

In the Florsheim Brothers Company case, this Court was careful to distinguish the class of cases there involved from the class to which the present case belongs. In that case the assessment was made after March 15, 1925, and, therefore, after the passage of the Revenue Act of 1924. This being true, the case did not fall within the excepting clause of Section 278(*e*) of the Revenue Act of 1924 (43 Stats. 253-297), which provides that Section 278 "shall not * * * affect any assessment made or distraint or proceeding in Court begun before the enactment of this Act". In the present case the assessment was made in March, 1923, and, therefore, before the enactment of the 1924 Act. Said the Court in the Florsheim case:

> "The question as to the applicability of the later Acts may be briefly disposed of. Section 1100 of the Revenue Act of 1924 repealed the 1921 Act. Section 277(*a*)(2) of the 1924 Act expressly dealt with taxes due under the Acts of 1918 and 1921; and it reenacted the five-year

limitation with the express qualification, 'Except as provided in Section 278'. Section 278(*c*) re-enacted the provision as to extension of time by the consent of the Commissioner and the taxpayer; and constituted the sole statutory authority for the waiver of the period of limitation for taxes due under the 1918 and 1921 Acts. It unquestionably applied to waivers thereafter to be executed; and no reason appears why it did not equally apply to waivers executed prior to the passage of the Act. Section 278(*d*) prescribed the period of limitation for the collection of taxes applicable to all cases enumerated in that section and Section 277, which expressly included taxes under the Act of 1918. The situations intended to be excluded from the limitations prescribed were carefully specified in Section 278(*e*): (1) assessments or collections already barred before the passage of that Act and (2) *assessments made and proceedings begun prior to that time. Neither of the cases at bar falls within those exceptions.* Since, in both cases, assessment and collection were not barred on the enactment of the 1924 Act, *and were made after that date,* the section is applicable. Compare Russell *v.* United States, 278 U. S. 181."

All of which is respectfully submitted.

W. W. SPALDING,
Washington, D. C.,
Counsel for Petitioner.

MASON, SPALDING & McATEE,
Washington, D. C.,
Of Counsel.

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No. 115

In the Supreme Court of the United States

OCTOBER TERM, 1930

W. P. BROWN & SONS LUMBER COMPANY, PETITIONER

v.

ROBERT H. LUCAS, COMMISSIONER OF INTERNAL REVENUE

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

MOTION TO ADVANCE

In the Supreme Court of the United States

OCTOBER TERM, 1930

No. 115

W. P. BROWN & SONS LUMBER COMPANY,
PETITIONER

v.

ROBERT H. LUCAS, COMMISSIONER OF INTERNAL REVENUE

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

MOTION TO ADVANCE

Comes now the respondent in the above-entitled cause, by his counsel the Solicitor General, and moves to advance this case so that the following three cases may be heard consecutively:

No. 23, Charles H. Stange, petitioner, *v.* The United States; No. 69, Annette Aiken, administratrix of the estate of Fred M. Aiken, deceased, petitioner, *v.* Robert H. Lucas, Commissioner of Internal Revenue; and No. 115, W. P. Brown & Sons Lumber Company, petitioner, *v.* Robert H. Lucas, Commissioner of Internal Revenue.

A motion to the same effect has been made in No. 69, Annette Aiken, administratrix of the estate of Fred M. Aiken, deceased, petitioner, *v.* Robert H. Lucas, Commissioner of Internal Revenue, to which reference is made for the reasons in support of these motions to hear the three cases consecutively.

Opposing counsel concur in this motion.

Respectfully submitted.

THOMAS D. THACHER,
Solicitor General.

JULY, 1930.

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No. ~~895~~ 115

In the Supreme Court of the United States

OCTOBER TERM, 1929

W. P. BROWN & SONS LUMBER COMPANY, PETITIONER

v.

ROBERT H. LUCAS, COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT

In the Supreme Court of the United States

OCTOBER TERM, 1929

No. 895

W. P. BROWN & SONS LUMBER COMPANY, PETITIONER

v.

ROBERT H. LUCAS, COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT

The respondent does not oppose the petition in this case.

STATUTES INVOLVED

The statutes involved are set forth in the appendix at the end of this memorandum.

I

Two of the questions which are presented by the petition for certiorari are now before this Court in the cases of *Charles H. Stange* v. *United States,* No. 554, October Term, 1929, writ of certiorari granted March 3, 1930, and *Annette Aiken, Administratrix of the Estate of Friend N. Aiken, deceased,* v. *Robert H. Lucas, Commissioner of In-*

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ternal Revenue, No. 777, October Term, 1929, writ of certiorari granted May 5, 1930.

One of these questions is whether a consent in writing, waiving the period of limitations for *assessment* of taxes due for 1917, also confers upon the Commissioner of Internal Revenue the right to *collect* the tax after the expiration of the statutory period for collection. If the waiver as to assessment does not also include a waiver as to collection, a second question arises, whether a consent in writing, waving the period of limitations for *collection* of taxes due for 1917, is valid and effective when executed after the period of limitations for collection had already expired.

On December 13, 1920, the petitioner filed an unlimited waiver of all statutory limitations as to *assessment.* (R. 29.) This waiver was terminated on April 1, 1924, by a ruling of the Treasury Department. II–1 Cumulative Bulletin, p. 174. The statutory period within which assessment and collection could be made in this case would have expired on April 1, 1923, five years after the return was filed. On December 10, 1923, the petitioner filed a waiver extending the period for *assessment and collection* to December 10, 1924. (R. 31.) On October 25, 1924, the petitioner filed another waiver extending the period for *assessment and collection* to December 10, 1925. (R. 33.) The question presented is the effectiveness of these

waivers to extend the period for *collection* beyond April 1, 1923.

II

The other questions raised in the petition for certiorari, we submit, do not warrant review by this Court.

One of these questions relates not to the efficacy of the waivers to extend the period for *collection* beyond April 1, 1923, but to the question whether, assuming that the period was so extended, it has, nevertheless, now expired. On March 6, 1923, the Commissioner made a jeopardy deficiency assessment and later that month the petitioner filed a claim for the abatement of this assessment. (R. 4, 12.) On October 28, 1925, the Commissioner notified the petitioner of the partial allowance of the claim in abatement (R. 4, 12), and on November 18, 1925, the petitioner filed an appeal from this determination with the Board of Tax Appeals (R. 3).

The Circuit Court of Appeals held that the Commissioner's final determination of the 1917 deficiency was made on October 28, 1925, as evidenced by the Commissioner's notice of that date, within the period of limitations as to assessment and collection contained in the final waiver, from which determination the taxpayer appealed to the Board of Tax Appeals; and that by reason of the provisions of Section 280 and related sections of the

Revenue Act of 1924 (*infra*) and of Sections 283 (f) and 283 (*l*) of the Revenue Act of 1926 (*infra*), the period of limitation for assessment and collection of the deficiency was suspended until after the decision of the Board should become final. It is submitted that this decision is not in conflict with the decision of this Court in *Russell* v. *United States*, 278 U. S. 181, where it was held that the six-year period for collection provided by Section 278(d) of the Revenue Act of 1924 was not intended to apply to the collection of the tax upon an assessment made prior to June 2, 1924, the effective date of the Revenue Act of 1924. In the instant case a jeopardy assessment was made on March 6, 1923; but this was not a final determination, since the taxpayer filed a claim in abatement. Pending the Commissioner's final action on the claim, additional waivers of assessment and collection were filed. The Commissioner's final determination of the correct amount of the deficiency was not made until October 28, 1925, when he mailed a notice to the taxpayer allowing the claim in abatement in part. It was from this determination that the taxpayer appealed to the Board of Tax Appeals. The instant case thus differs from the *Russell case* in that here the taxpayer was permitted to take advantage of the new right of appeal to the Board for a determination of its tax liability. The period of limitation for assessment and collection was sus-

pended by this appeal. Sections 277(b), 278(d), and 280 of the Revenue Act of 1924 (*infra.*).

The petitioner also contends that Section 283(f) of the Revenue Act of 1926 (*infra*), and related sections of that Act, may not be given a retroactive effect. But that section is by its express terms retroactive. The language used is susceptible of no other construction. The facts in the instant case clearly come within the express provisions of that section.

The petitioner denies that the waiver of October 25, 1924, is still in full force and effect since by its terms it expired on December 10, 1925. This contention was disposed of by this Court in *Florsheim Bros. Dry Goods Co.* v. *United States,* 280 U. S. 453. It was there held that the Revenue Acts of 1924 and 1926, which were enacted while similar waivers were still in force and while the taxpayer's liability was thus still alive, extended the period for collection to six years after assessment.

CONCLUSION

Although the United States does not oppose the petition in this case, we submit that the decision of the court below on the points discussed in subdivision II of this Memorandum was correct and that there is no conflict on these questions. We, therefore, suggest that this Court limit its review to the question whether the waivers filed by the tax-

payer were effective to extend the period for collection of the tax beyond April 1, 1923.

Respectfully submitted.

THOMAS D. THACHER,
Solicitor General.

G. A. YOUNGQUIST,
Assistant Attorney General.

CLAUDE R. BRANCH,
J. LOUIS MONARCH,
NORMAN D. KELLER,
JOHN G. REMEY,
Special Assistants to the Attorney General.

ERWIN N. GRISWOLD,
Attorney.

MAY, 1930.

APPENDIX

The Revenue Act of 1924, c. 234, 43 Stat. 253, provides in part:

> SEC. 274. (a) If, in the case of any taxpayer, the Commissioner determines that there is a deficiency in respect of the tax imposed * * * the taxpayer * * * shall be notified of such deficiency by registered mail, but such deficiency shall be assessed only as hereinafter provided. Within 60 days after such notice is mailed the taxpayer may file an appeal with the Board of Tax Appeals. * * *
>
> (b) If the Board determines that there is a deficiency, the amount so determined shall be assessed and shall be paid upon notice and demand from the collector. * * * proceeding [for collection] shall be begun within one year after the final decision of the Board, and may be begun within such year even though the period of limitation prescribed in section 277 has expired.
>
> SEC. 277. (a) Except as provided in section 278 and in subsection (b) of section 274 and in subsection (b) of section 279.
>
> * * * * *
>
> (2) The amount of income, excess-profits, and war-profits taxes imposed by * * * the Revenue Act of 1917, * * * shall be

assessed within five years after the return was filed, and no proceeding in court for the collection of such taxes shall be begun after the expiration of such period.

* * * * *

(b) The period within which an assessment is required to be made by subdivision (a) of this section in respect of any deficiency shall be extended (1) by 60 days if a notice of such deficiency has been mailed to the taxpayer under subdivision (a) of section 274 and no appeal has been filed with the Board of Tax Appeals, or (2) if an appeal has been filed, then by the number of days between the date of the mailing of such notice and the date of the final decision by the Board.

SEC. 278. * * *

(d) Where the assessment of the tax is made within the period prescribed in section 277 or in this section, such tax may be collected by distraint or by a proceeding in court, begun within six years after the assessment of the tax. Nothing in this Act shall be construed as preventing the beginning, without assessment, of a proceeding in court for the collection of the tax at any time before the expiration of the period within which an assessment may be made.

SEC. 280. If after the enactment of this Act the Commissioner determines that an assessment should be made in respect of any * * * tax imposed by * * * the Revenue Act of 1917 * * * the amount which should be assessed (whether

as deficiency or as interest, penalty, or other addition to the tax) shall be computed as if this Act had not been enacted, but the amount so computed shall be assessed, collected, and paid in the same manner and subject to the same provisions and limitations (including the provisions in case of delinquency in payment after notice and demand) as in the case of the taxes imposed by this title, except as otherwise provided in section 277.

The Revenue Act of 1926, c. 27, 44 Stat. 9, provides in part:

SEC. 274. (a) If in the case of any taxpayer the Commissioner determines that there is a deficiency in respect of the tax imposed by this title, the Commissioner is authorized to send notice of such deficiency to the taxpayer by registered mail. Within 60 days after such notice is mailed (not counting Sunday as the sixtieth day) the taxpayer may file a petition with the Board of Tax Appeals for a redetermination of the deficiency. Except as otherwise provided in subdivision (d) or (f) of this section or in section 279, 282, or 1001, no assessment of a deficiency in respect of the tax imposed by this title and no distraint or proceeding in court for its collection shall be made, begun, or prosecuted until such notice has been mailed to the taxpayer, nor until the expiration of such 60-day period, nor, if a petition has been filed with the Board, until the decision of the Board has become final.

Notwithstanding the provisions of section 3224 of the Revised Statutes the making of such assessment or the beginning of such proceeding or distraint during the time such prohibition is in force may be enjoined by a proceeding in the proper court.

SEC. 277. (a) Except as provided in section 278—

* * * * *

(3) The amount of income, excess-profits, and war-profits taxes imposed by * * * the Revenue Act of 1917, * * * shall be assessed within five years after the return was filed, and no proceeding in court without assessment for the collection of such taxes shall be begun after the expiration of such period.

* * * * *

(b) The running of the statute of limitations provided in this section or in section 278 on the making of assessments and the beginning of distraint or a proceeding in court for collection, in respect of any deficiency, shall (after the mailing of a notice under subdivision [a] of section 247) be suspended for the period during which the Commissioner is prohibited from making the assessment or beginning distraint of a proceeding in court, and for 60 days thereafter.

SEC. 278. * * *

(d) Where the assessment of any income, excess-profits, or war-profits tax imposed by this title or by prior Act of Congress has been made (whether before or after the enactment of this Act) within the statutory period of

limitation properly applicable thereto, such tax may be collected by distraint or by a proceeding in court (begun before or after the enactment of this Act), but only if begun (1) within six years after the assessment of the tax, or (2) prior to the expiration of any period for collection agreed upon in writing by the Commissioner and the taxpayer.

(e) This section shall not bar a distraint or proceeding in court begun before the enactment of the Revenue Act of 1924; nor shall it authorize the assessment of a tax or the collection thereof by distraint or by proceeding in court (1) if at the time of the enactment of this Act such assessment, distraint or proceeding was barred by the statutory period of limitation properly applicable thereto, unless prior to the enactment of this Act the Commissioner and the taxpayer agreed in writing thereto or (2) contrary to the provisions of subdivision (a) of section 274 of this Act.

SEC. 283. * * *

(e) If any deficiency in any income, war-profits, or excess-profits tax imposed * * * by * * * the Revenue Act of 1917, * * * was assessed before June 3, 1924, but was not paid in full before the date of the enactment of this Act, and if the Commissioner, after the enactment of this Act, finally determines the amount of the deficiency, he is authorized to send by registered mail to the person liable for such tax notice of such deficiency, which notice shall, for the purposes of this Act, be considered a

notice under subdivision (a) of section 274 of this Act. In the case of any such final determination the amount of the tax (whether deficiency or interest, penalty, or other addition to the tax) shall, except as provided in subdivision (h) of this section, be computed as if this Act had not been enacted, but the amount so computed shall be collected and paid in the same manner and subject to the same provisions and limitations (including the provisions in case of delinquency in payment after notice and demand, and the provisions relating to claims and suits for refund) as in the case of a deficiency in the tax imposed by this title, except as otherwise provided in section 277 of this Act and in subdivision (i) of this section.

(f) If any deficiency in any income, war-profits, or excess-profits tax imposed by * * * the Revenue Act of 1917, * * * was assessed before June 3, 1924, but was not paid in full before that date, and if the Commissioner after June 2, 1924, but before the enactment of this Act finally determined the amount of the deficiency, and if the person liable for such tax appealed before the enactment of this Act to the Board and the appeal is pending before the Board at the time of the enactment of this Act, the Board shall have jurisdiction of the appeal. In all such cases the powers, duties, rights, and privileges of the Commissioner and of the person who has brought the appeal, and the jurisdiction of the Board and of the courts,

shall be determined, and the computation of the tax shall be made, in the same manner as provided in subdivision (e) of this section, except as provided in subdivision (j) of this section and except that the person liable for the tax shall not be subject to the provisions of subdivision (d) of section 284.

* * * * *

(1) In the case of any income, war-profits, or excess-profits tax imposed by prior Act of Congress, in computing the period of limitations provided in section 277 or 278 of this Act on the making of assessments and the beginning of distraint or a proceeding in court, the running of the statute of limitations shall be considered to have been suspended (in addition to the period of suspension provided for in subdivision [b] of section 277) for any period prior to the enactment of this Act during which the Commissioner was prohibited from making the assessment or beginning distraint or proceeding in court.

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No. 115

In the Supreme Court of the United States

OCTOBER TERM, 1930

W. P. BROWN & SONS LUMBER COMPANY,
PETITIONER

v.

DAVID BURNET, COMMISSIONER OF INTERNAL REVENUE

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENT

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In the Supreme Court of the United States

OCTOBER TERM, 1930

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DAVID BURNET, COMMISSIONER OF INTERNAL REVENUE

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENT

OPINIONS BELOW

The memorandum opinion of the Board of Tax Appeals (R. 16, 18) is reported in 13 B. T. A. 1425, and the opinion of the United States Circuit Court of Appeals for the Sixth Circuit (R. 37, 50), sustaining the determination of the Board, is reported in 38 F. (2d) 425. Because of confusion between the footnotes and the opinion in the record, the opinion, without footnotes, is set out in the Appendix, *infra*, pp. 20–31.

JURISDICTION

The decree of the United States Circuit Court of Appeals for the Sixth Circuit was filed February 21, 1930. (R. 37.) Petition for writ of certiorari was filed May 14, 1930 (R. 52), and was granted with limitations on June 2, 1930 (R. 52), 281 U. S. 718.

The jurisdiction of this Court rests on Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTION PRESENTED

The principal question presented is:

Whether written consents, executed by the taxpayer and the Commissioner of Internal Revenue, waiving the statutory period for the assessment and collection of taxes are valid, although given after the expiration of the statutory period.

STATUTES INVOLVED

The statutes involved are set out in the Appendix, *infra*, pp. 12–19.

STATEMENT

The order of this Court allowing the writ of certiorari in this cause limited the briefs and argument to "the question of the validity and effect of the waivers."

The findings of fact of the Circuit Court of Appeals for the Sixth Circuit included in the court's opinion (R. 37–43) are accepted by the petitioner. (Pet. 2.) The vital facts may be abridged as follows:

Petitioner filed its income and profits tax return for the year 1917 on April 1, 1918. (R. 37.) In December, 1920, an assessment waiver was filed which need not be considered. (R. 29.)

On March 5, 1923, the Commissioner made a jeopardy assessment of a deficiency in tax for the year 1917. (R. 37.) Thus this assessment was within the five-year statutory period for assessment. On March 27, 1923, the petitioner filed a claim in abatement. (R. 28, 37.) Collection was deferred and has not yet been made.

On April 1, 1923, the five-year statutory period for the collection of the 1917 taxes expired.

On December 10, 1923, the petitioner filed a waiver reading as follows (R. 31, 37):

> In pursuance of the provisions of subdivision (d) of Section 250 of the Revenue Act of 1921, W. P. Brown and Sons Lumber Company, of Louisville, Kentucky, and the Commissioner of Internal Revenue, hereby consent to a determination, assessment, and collection of the amount of income, excess-profits, or war-profits taxes due under any return made by or on behalf of the said * * * for the years 1917 and 1918, under the Revenue Act of 1921, or under prior income, excess-profits, or war-profits tax Acts, or under Section 38 of the Act entitled "An Act to provide revenue, equalize duties, and encourage the industries of the United States, and for other purposes," approved

August 5, 1909. This waiver is in effect for one year from the date it is signed by the taxpayer.

W. P. BROWN & SONS LUMBER CO. (S.),
By PRESTON P. JOYES, *Treas.* [SEAL.]
D. H. BLAIR (S.), *Commissioner.*
DEC. 15, 1923.

On October 25, 1924, the petitioner filed a further waiver, reading as follows (R. 33, 37):

In pursuance of the provision of existing Internal Revenue Laws, W. P. Brown & Sons Lumber Company, a taxpayer, of Louisville, Kentucky, and the Commissioner of Internal Revenue, hereby consent to extend the period prescribed by law for a determination, assessment, and collection of the amount of income, excess-profits, or war-profits taxes due under any return made by or on behalf of said taxpayer for the years 1917, 1918, and 1919 under the Revenue Act of 1924, or under prior income, excess-profits, or war-profits tax Acts, or under Section 38 of the Act entitled "An Act to provide revenue, equalize duties, and encourage the industries of the United States, and for other purposes," approved August 5, 1909. This waiver is in effect for a period of one year after the expiration of the statutory period of limitation within which assessments of taxes may be made for the year or years mentioned, or the statutory period

of limitations as extended by Section 277 (b) of the Revenue Act of 1924, or by any waivers already on file with the Bureau.

W. P. BROWN & SONS LUMBER CO. (S.),
By J. G. BROWN, *Pres.* (S.)

This waiver was also signed by the Commissioner. (R. 17.)

The claim in abatement filed by the petitioner was allowed in part and rejected in part by the Commissioner of Internal Revenue, and the petitioner was advised of the action thus taken by letter dated October 28, 1925. (R. 6, 38.) The petitioner appealed to the Board of Tax Appeals from this determination on November 18, 1925. (R. 38.) The Board upheld the determination of the Commissioner. (R. 16.) The Circuit Court of Appeals for the Sixth Circuit affirmed the decision of the Board. (R. 37.)

SUMMARY OF ARGUMENT

Assessment of the petitioner's 1917 taxes would have been barred on April 1, 1923, had not the period for assessment been extended by the waivers. On March 5, 1923, the Commissioner made a jeopardy assessment. Thereupon the petitioner filed a claim in abatement. No part of the amount so assessed has been collected. On October 28, 1925, the claim in abatement was allowed in part and rejected in part by the Commissioner, and the peti-

tioner was notified of this action by letter of the Commissioner. On November 18, 1925, the petitioner appealed to the Board of Tax Appeals from this determination. Owing to the appellate proceedings the decision of the Board has not become final.

The respondent relies upon the waiver executed by the petitioner and the Commissioner on or about October 25, 1924. We contend that the fact that this waiver was given after the expiration of the statutory period for assessment and collection does not render it invalid. If valid, its effect is to extend the period for determination, assessment, and collection at least until December 10, 1925.

Because of the taking of the appeal to the Board and the other events which preceded it, statutes extend the time for collection until after the decision of this Court.

Furthermore, we contend that the waiver should be construed, because of its express terms, to permit assessment and collection within forty-two days after the final decision of the Board, at least. This position is predicated upon the provision in the waiver that it is "in effect for a period of one year after the expiration of the statutory period of limitation * * * as extended by Section 277(b) of the Revenue Act of 1924."

ARGUMENT

I

On the Construction of the Waivers Urged by the Petitioner, the Decision Below Must be Affirmed

A. The waivers operated to extend the period for determination, assessment, and collection at least until December 10, 1925

By the waiver of October 25, 1924 (pp. 4–5, *supra*), the parties consented "to extend the period prescribed by law for a determination, assessment, and collection." The instrument provided:

> This waiver is in effect for a period of one year after the expiration of the statutory period of limitation within which assessments of taxes may be made for the year or years mentioned, * * * or by any waivers already on file with the Bureau.

A waiver of December 10, 1923 (pp. 3–4, *supra*), consented to determination, assessment, and collection, and expressly provided that it was "in effect for one year from the date it is signed by the taxpayer." By virtue of these two waivers the statutory period was consequently extended to December 10, 1925.

The only question is whether these waivers were valid. The waiver of December 10, 1923, was given while the Revenue Act of 1921 was effective. Its validity is dependent upon the provisions of the same Act as the waiver involved in *Stange* v. *United States,* No. 23, present term. The ques-

tion of the validity of such a waiver is fully discussed on pages 6 to 14 in the revised brief filed by the Government in that case.

The second waiver was filed while the Revenue Act of 1924 was effective. The validity of such a waiver is fully discussed on pages 5–9 of the Government's brief in *Burnet* v. *Chicago Railway Equipment Company,* No. 231, present term.

B. STATUTES OPERATED TO EXTEND THE TIME OF ASSESSMENT AND COLLECTION UNTIL AFTER THE DECISION OF THIS COURT

A large part of the opinion of the court below was concerned with this question, which, in the view taken by that court, was not at all dependent upon the effect of the waivers. As the order of this Court limited the briefs and arguments to a discussion of the validity and effect of the waivers, we submit that the question of the effect of these statutes is not now open to review, and that petitioner is bound by the conclusions of the court below.

In any event, we submit that the court below was correct on this point. A consideration of this involves the study of numerous sections of the statutes. The opinion of the court below (R. 48–50; Appendix B, pp. 28–31, *infra*) indicates the route to be followed through the maze. We submit that its analysis of these statutes and its conclusion in regard to them are correct. In Appendix C, pp. 32–35, *infra,* we have outlined the argument in some detail.

II

THE REFERENCE IN THE WAIVER OF OCTOBER 25, 1925, TO SECTION 277 (B) OF THE REVENUE ACT OF 1924 OPERATES TO POSTPONE THE TIME FOR ASSESSMENT AND COLLECTION UNTIL AFTER THE DECISION OF THIS COURT IN THIS CASE

By the waiver of October 25, 1924, the taxpayer consented—

> to extend the period prescribed by law for determination, assessment, and collection * * *. This waiver is in effect for a period of one year after the expiration of the statutory period of limitation within which assessment of taxes may be made for the year or years mentioned, or *the statutory period of limitations as extended by Section 277 (b) of the Revenue Act of 1924,* or by any waivers already on file with the Bureau. (Italics ours.)

Section 277 (b) provided:

> The period within which an assessment is required to be made * * * shall be extended * * * if an appeal has been filed then by the number of days between the date of the mailing of such notice and the date of the final decision by the Board.

If this waiver was valid it extended the period for determination, assessment, and collection at least until December 10, 1925. (See p. 7, *supra.*) The Commissioner mailed the petitioner a deficiency letter on October 28, 1925, and on November 18, 1925, the petitioner filed an appeal with the

Board of Tax Appeals. Consequently at the time when the notice was mailed the Commissioner had about forty-two days left within which to make an assessment and collection, and under the terms of Section 277 (b) he would have forty-two days after the final decision of the Board within which to take these steps. The decision of the Board does not become final until after the date of the issuance of the mandate of this Court. Section 1005 of the Act of 1926, pp. 17–18, *infra*.

Assuming the validity of the waivers, this conclusion is inescapable, unless, as the petitioner contends, (1) the fact that Section 277 (b) applied merely to "the period within which assessment is required" prevents this provision of the waiver from having any effect upon the time for collection, or (2) unless the fact that Section 277 (b) was repealed by Section 1200 of the Revenue Act of 1926 operates to affect the language of the waiver.

We maintain that neither of these contentions is sound. The reference to "the statutory period of limitations as extended by Section 277 (b)" has, we submit, the same effect as if the provisions of that section as to time were copied into the waiver and the waiver should consequently be construed to read:

> This waiver is in effect for a period of one year after the expiration of the statutory period of limitations within which assessment of taxes may be made as extended by waivers already on file, and, if an appeal

> is taken, then also by the number of days between the date of the mailing of such notice and the date of the final decision of the Board.

The fact that Section 277 (b) refers only to the period within which *assessment* is required is immaterial. The waiver was for "determination, assessment, and collection," but the life of the waiver was measured by the statutory period for assessments.

The contention of the petitioner that its tax liability has ended because the Revenue Acts of 1924 and 1926 did not serve to extend the period of collection which had not expired at the time of their enactment, was disposed of by this Court in the case of *Florsheim Bros. Co.* v. *United States,* 280 U. S. 453.

CONCLUSION

It is respectfully submitted that the judgment of the court below is correct and should be affirmed.

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NOVEMBER, 1930.

APPENDIX A

STATUTES INVOLVED

Section 250 (d) of the Revenue Act of 1921, c. 136, 42 Stat. 227, 265, provides in part:

> SEC. 250. * * * (d) The amount of income, excess-profits, or war-profits taxes due under any return made under this Act for the taxable year 1921 or succeeding taxable years shall be determined and assessed by the Commissioner within four years after the return was filed, and the amount of any such taxes due under any return made under this Act for prior taxable years or under prior income, excess-profits, or war-profits tax Acts, or under section 38 of the Act entitled "An Act to provide revenue, equalize duties, and encourage the industries of the United States, and for other purposes," approved August 5, 1909, shall be determined and assessed within five years after the return was filed, unless both the Commissioner and the taxpayer consent in writing to a later determination, assessment, and collection of the tax; and no suit or proceeding for the collection of any such taxes due under this Act or under prior income, excess profits, or war profits tax Acts, or of any taxes due under section 38 of such Act of August 5, 1909, shall be begun, after the expiration of five years after the date when such return was filed, but this shall not affect suits or proceedings begun at the time of the passage of this Act; * * *.

Section 277 (b) of the Revenue Act of 1924, c. 234, 43 Stat. 253, 299, provides:

> (b) The period within which an assessment is required to be made by subdivision (a) of this section in respect of any deficiency shall be extended (1) by 60 days if a notice of such deficiency has been mailed to the taxpayer under subdivision (a) of section 274 and no appeal has been filed with the Board of Tax Appeals, or (2) if an appeal has been filed, then by the number of days between the date of the mailing of such notice and the date of the final decision by the Board. (U. S. C. Title 26, Sec. 1057.)

Section 278 (d) of the Revenue Act of 1924, c. 234, 43 Stat. 253, 300, provides:

> (d) Where the assessment of the tax is made within the period prescribed in section 277 or in this section, such tax may be collected by distraint or by a proceeding in court, begun within six years after the assessment of the tax. Nothing in this Act shall be construed as preventing the beginning, without assessment, of a proceeding in court for the collection of the tax at any time before the expiration of the period within which an assessment may be made. (U. S. C. Title 26, Sec. 1061.)

Section 274 (a) of the Revenue Act of 1926, c. 27, 44 Stat. 9, 55, provides:

> If in the case of any taxpayer, the Commissioner determines that there is a deficiency in respect of the tax imposed by this title, the Commissioner is authorized to send notice of such deficiency to the taxpayer by registered mail. Within 60 days after such notice is mailed (not counting Sunday as the sixtieth day), the taxpayer may file a peti-

> tion with the Board of Tax Appeals for a redetermination of the deficiency. Except as otherwise provided in subdivision (d) or (f) of this section or in section 279, 282, or 1001, no assessment of a deficiency in respect of the tax imposed by this title and no distraint or proceeding in court for its collection shall be made, begun, or prosecuted until such notice has been mailed to the taxpayer, nor until the expiration of such 60-day period, nor, if a petition has been filed with the Board, until the decision of the Board has become final. Notwithstanding the provisions of section 3224 of the Revised Statutes, the making of such assessment or the beginning of such proceeding or distraint during the time such prohibition is in force may be enjoined by a proceeding in the proper court. (U. S. C. App. Title 26, Sec. 1048.)

Section 277 (b) of the Revenue Act of 1926, c. 27, 44 Stat. 9, 58, provides:

> (b) The running of the statute of limitations provided in this section or in section 278 on the making of assessments and the beginning of distraint or a proceeding in court for collection, in respect of any deficiency, shall (after the mailing of a notice under subdivision (a) of section 274) be suspended for the period during which the Commissioner is prohibited from making the assessment or beginning distraint or a proceeding in court, and for 60 days thereafter. (U. S. C. App. Title 26, Sec. 1057.)

Sections 278 (d) and (e) of the Revenue Act of 1926, c. 27, 44 Stat. 9, 59, provide:

> (d) Where the assessment of any income, excess-profits, or war-profits tax imposed by this title or by prior Act of Congress has

been made (whether before or after the enactment of this Act) within the statutory period of limitation properly applicable thereto, such tax may be collected by distraint or by a proceeding in court (begun before or after the enactment of this Act), but only if begun (1) within six years after the assessment of the tax, or (2) prior to the expiration of any period for collection agreed upon in writing by the Commissioner and the taxpayer. (U. S. C. App. Title 26, Sec. 1061.)

(e) This section shall not bar a distraint or proceeding in court begun before the enactment of the Revenue Act of 1924; nor shall it authorize the assessment of a tax or the collection thereof by distraint or by proceeding in Court (1) if at the time of the enactment of this Act such assessment, distraint or proceeding was barred by the statutory period of limitation properly applicable thereto, unless prior to the enactment of this Act the Commissioner and the taxpayer agreed in writing thereto, or (2) contrary to the provisions of subdivision (a) of section 274 of this Act. (U. S. C. App. Title 26, Sec. 1062.)

Section 283 (e), (f), and (i) of the Revenue Act of 1926, c. 27, 44 Stat. 9, 63, 64, 65, provide:

(e) If any deficiency in any income, war-profits, or excess-profits tax imposed by the Revenue Act of 1916, the Revenue Act of 1917, the Revenue Act of 1918, or the Revenue Act of 1921, or by any such Act as amended, was assessed before June 3, 1924, but was not paid in full before the date of the enactment of this Act, and if the Commissioner, after the enactment of this Act, finally determines the amount of the defi-

ciency, he is authorized to send by registered mail to the person liable for such tax notice of such deficiency, which notice shall, for the purposes of this Act, be considered a notice under subdivision (a) of section 274 of this Act. In the case of any such final determination the amount of the tax (whether deficiency or interest, penalty, or other addition to the tax) shall, except as provided in subdivision (h) of this section, be computed as if this Act had not been enacted, but the amount so computed shall be collected and paid in the same manner and subject to the same provisions and limitations (including the provisions in case of delinquency in payment after notice and demand, and the provisions relating to claims and suits for refund) as in the case of a deficiency in the tax imposed by this title, except as otherwise provided in section 277 of this Act and in subdivision (i) of this section.

(f) If any deficiency in any income, war-profits, or excess-profits tax imposed by the Revenue Act of 1916, the Revenue Act of 1917, the Revenue Act of 1918, the Revenue Act of 1921, or by any such Act as amended, was assessed before June 3, 1924, but was not paid in full before that date, and if the Commissioner after June 2, 1924, but before the enactment of this Act finally determined the amount of the deficiency, and if the person liable for such tax appealed before the enactment of this Act to the Board and the appeal is pending before the Board at the time of the enactment of this Act, the Board shall have jurisdiction of the appeal. In all such cases the powers, duties, rights, and privileges of the Commissioner and of the person who has brought the appeal, and the jurisdiction of the Board and

of the courts, shall be determined, and the computation of the tax shall be made, in the same manner as provided in subdivision (e) of this section, except as provided in subdivision (j) of this section and except that the person liable for the tax shall not be subject to the provisions of subdivision (d) of section 284.

* * * * *

(i) In cases within the scope of subdivision (e), (f), or (g), if the Commissioner believes that the collection of the deficiency will be jeopardized by delay, he may, despite the provisions of subdivision (a) of section 274 of this Act, instruct the collector to proceed to enforce the payment of the unpaid portion of the deficiency, and notice and demand shall be made by the collector for the payment thereof. Within 10 days after such jeopardy notice and demand the person liable for the tax may obtain a stay of collection of the whole or any part of the amount included in the notice and demand by filing with the collector a bond in like manner, under the same conditions, and with the same effect, as in the case of a bond to stay the collection of a jeopardy assessment under section 279 of this Act. (U. S. C. App. Title 26, Sec. 1064.)

Section 1005 of the Revenue Act of 1926, c. 27, 44 Stat. 9, 110, provides in part:

SEC. 1005. (a) The decision of the Board shall become final— * * * (4) Upon the expiration of 30 days from the date of issuance of the mandate of the Supreme Court, if such Court directs that the decision of the Board be affirmed or the petition for review dismissed.

(b) If the Supreme Court directs that the decision of the Board be modified or reversed, the decision of the Board rendered in accordance with the mandate of the Supreme Court shall become final upon the expiration of 30 days from the time it was rendered, unless within such 30 days either the Commissioner or the taxpayer has instituted proceedings to have such decision corrected to accord with the mandate, in which event the decision of the Board shall become final when so corrected. (U. S. C. App., Title 26, Sec. 1228.)

Sections 504 and 506 of the Revenue Act of 1928, c. 852, 45 Stat. 791, 870, provide in part:

SEC. 504. SUSPENSION OF RUNNING OF STATUTE OF LIMITATIONS.

(a) Section 277 (b) of the Revenue Act of 1926 is amended to read as follows:

"(b) The running of the statute of limitations provided in this section or in section 278 on the making of assessments and the beginning of distraint or a proceeding in court for collection, in respect of any deficiency, shall (after the mailing of a notice under subdivision (a) of section 274) be suspended for the period during which the Commissioner is prohibited from making the assessment or beginning distraint or a proceeding in court (and in any event, if a proceeding in respect of the deficiency is placed on the docket of the Board, until the decision of the Board becomes final) and for 60 days thereafter."

(b) Subsection (a) of this section shall apply in all cases where the period of limitation has not expired prior to the enactment of this Act.

SEC. 506. WAIVERS AFTER EXPIRATION OF PERIOD OF LIMITATION.

(a) Section 278 (c) and (d) of the Revenue Act of 1926 are amended to read as follows:

* * * * *

"(d) Where the assessment of any income, excess-profits, or war-profits taxes imposed by this title or by prior Act of Congress has been made (whether before or after the enactment of this Act) within the period of limitation properly applicable thereto, such tax may be collected by distraint or by a proceeding in court (begun before or after the enactment of this Act), but only if begun (1) within six years after the assessment of the tax, or (2) prior to the expiration of any period for collection agreed upon in writing by the Commissioner and the taxpayer before the expiration of such six-year period. The period so agreed upon may be extended by subsequent agreements in writing made before the expiration of the period previously agreed upon."

* * * * *

(c) The amendments made by this section to the Revenue Act of 1926 shall not be construed as in any manner affecting the validity of waivers made prior to the enactment of this Act, which shall be determined according to the law in existence at the time such waiver was filed.

Section 3224 of the Revised Statutes provides:

SEC. 3224. No suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court. (U. S. C. Title 26, Sec. 154.)

APPENDIX B

No. 5376

UNITED STATES CIRCUIT COURT OF APPEALS, SIXTH CIRCUIT

OPINION

(Decided February 21, 1930)

W. P. BROWN & SONS LUMBER COMPANY AND Brown Brothers Land & Lumber Company

v.

COMMISSIONER OF INTERNAL REVENUE

PETITION TO REVIEW AN ORDER OF THE UNITED STATES BOARD OF TAX APPEALS REDETERMINING DEFICIENCIES IN TAXES FOR 1917 DUE FROM PETITIONERS

Before MOORMAN, MACK, and HICKS, Circuit Judges

MACK, Circuit Judge: * * *

On April 1, 1918, the other petitioner, W. P. Brown & Sons Lumber Company, filed its income and profits tax return for the year 1917; on December 13, 1920, it filed an unlimited waiver of "any and all statutory limitations as to the time within which assessments based upon such liability may be entered." On March 5, 1923, the Commissioner made a jeopardy deficiency assessment for the taxable year 1917 and in the same month petitioner filed a claim for the abatement thereof. Thereafter

petitioner filed a further waiver dated December 10, 1923, in which it consented "to a determination, assessment, and collection of the amount of income, excess profits, or war-profits taxes due under any return * * * for the year 1917 * * *." This waiver by its terms would have expired on December 10, 1924. On October 25, 1924, petitioner filed a similar waiver extending the period to "one year after the expiration of the statutory period of limitations within which assessment of taxes may be made for the year or years mentioned, or the statutory period of limitations as extended by Section 277 (b) of the Revenue Act of 1924, or by any waivers already on file with the Bureau."

On October 28, 1925, respondent notified petitioner of a partial allowance of the claim in abatement and of the definite determination of the amount of the deficiency. On November 18, 1925, petitioner filed an appeal with the Board of Tax Appeals from this determination of deficiency. Subsequently the amount of the deficiency assessment, if any was to be paid, was stipulated by the parties; and the appeal was thereafter confined solely to the question of whether or not its collection was barred by the statute of limitations. From the decision of the Board finding that the collection was not so barred, petitioner has brought this appeal. * * *

* * * * *

Petitioner contends: (1) That the waiver of December 13, 1920, can not be relied upon because in terms it extended solely the right to assess and not the right to collect; (2) that both the waivers of December 10, 1923, and October 25, 1924, are inappli-

cable because they relate only to taxes due "under any return" and the assessment sought to be collected was not a return by petitioner but an additional assessment made by the Commissioner in 1923; (3) that such waivers are also invalid because they were filed after the expiration of the statutory period for enforcing collection; (4) and, finally, that these waivers by their terms expired prior to the entry of the Board's order, and since, as petitioner maintains, Section 277 (b) of the Act of 1924 is inapplicable to the right of collection, and the statute had run prior to the enactment of the Act of 1926, collection is now barred.

Respondent contends: (1) that the waiver of December 10, 1923, although filed after the statute had run, is valid within Section 250 (d) of the Revenue Act of 1921; (2) that by virtue of this waiver and that of October 25, 1924, the period for determination, assessment, and collection of the petitioner's taxes for the year 1917 was extended to December 10, 1925; (3) that the extension of time granted by Section 277 (b) (2) and Section 278 (d) of the Revenue Act of 1924 is applicable; (4) and that since the Act of 1926 was passed while petitioner's appeal was pending, the period for collection was also thereby extended until the decision of the Board should have become final.

(1) It is conceded that unless the right of collection has been kept alive by waivers and by the provisions of the Revenue Acts of 1924 and 1926, the collection of the unabated stipulated portion of the additional assessment for 1917 is now barred under Section 250 (d) of the Revenue Act of 1921.

(2) We need not consider whether or not the unlimited waiver of December 13, 1920, included collection, because in our judgment the waiver of December 10, 1923, though given after the statute had run, was effective to revive the Government's right to assess and collect the taxes for 1917. Petitioner's argument that it was not, proceeds upon the double theory that Section 250 (d) of the Act of 1921 necessarily requires that the waiver be signed before the statute has run, and that if the specified period has elapsed, the right as well as the remedy is extinguished. We find nothing in the text or content of Section 250 (d) to require this construction. Statutes imposing limitations upon action by the United States are to be strictly construed in favor of the Government. *United States* v. *Whited & Wheless, Ltd.*, 246 U. S. 552; *du Pont de Nemours & Co.* v. *Davis*, 264 U. S. 456. It is true that the section requires that the Commissioner also sign the waiver (*Greylock Mills* v. *Commissioner*, 31 F. [2d] 655 [C. C. A. 2d]); and the Court of Appeals of the District of Columbia seems to be of the opinion that this precludes a waiver after the five years has run, on the theory that the Commissioner's consent would be but a futile gesture after his authority to collect the tax has ended. See *Joy Floral Co.* v. *Commissioner*, 29 F. (2d) 865.

The legislative purpose in requiring such consent is not apparent; if a contract is contemplated, it is difficult to see what consideration the Commissioner furnishes. See *Greylock Mills* v. *Commissioner*, 31 F. (2d) 655, 657. Another reason, however, may be suggested. Oral waivers would have

been subject to dispute and controversy as to form and meaning, and Congress made it clear that the taxpayer should not be bound except by a written waiver acceptable to the Commissioner. When a waiver is accepted, it is understood, if not impliedly agreed, that proceedings for the collection of the tax will be suspended until intensive and thorough consideration of the taxpayer's claimed exemptions, valuations, and the like will have been made. This would frequently result in a delay of the assessment and collection until after the statutory period had run, and as an incident of orderly administrative procedure it was essential that the Commissioner have full knowledge of the action taken and, therefore, that such a waiver be not accepted indiscriminately by a Collector or revenue agent. This may well account for the statutory requirement that to be effective, the waiver be signed by the Commissioner. The time of his signature, however, was not vital; as recently stated by the Court of Claims, after a thorough examination of the contention that a prior signature was necessary, "to hold that the statute requires the Commissioner to consent to the waiver before the expiration of the period of limitations is to engraft upon the statute something which certainly is not contained within its provisions nor, as we think, is there any reason to infer that such was the intent of Congress." *Stange* v. *United States,* Ct. Clms., November 4, 1929, United States Daily, November 8, 1929, pp. 2262–63. See also *Wells Bros. Co.* v. *Commissioner,* 16 B. T. A. 79; *Harris Co.* v. *Commissioner,* 16 B. T. A. 469.

The contention that the right as well as the remedy was barred and that consequently there was no

consideration for petitioner's waiver can not be accepted. This problem has recently arisen in connection with the asserted unconstitutionality of §§ 607 and 611 of the Revenue Act of 1928 (45 Stat. 874–75, 26 U. S. C. A. 2607, 2611) by which Congress in certain cases removed the bar of the statute after it had once fallen. It has been held in a number of cases that the bar imposed by Section 250 (d) of the Act of 1918 (40 Stat. 1083) and similar provisions in other acts goes merely to the remedy and not to the right, and that the legislature which imposed the bar may remove it. *Huntley* v. *Gile,* 32 F. (2d) 857 (C. C. A. 9th); *Wright & Taylor Co.* v. *Lucas,* W. D. Ky., decided July 26, 1929; *Regla Coal Co.* v. *Bowers,* S. D. N. Y., decided by the writer, November 13, 1929. In any event, the bar of the remedy, provided by the ordinary statute of limitations, may be effectively waived without consideration. See Williston, Contracts, §§ 160–84.

(3) Petitioner's contention that the waivers of 1923 and 1924 include taxes due only under its return needs little discussion. The argument is that the language "due under any return made by or on behalf of said taxpayer" in the waiver limits the consent to a later determination, assessment, and collection of only such taxes as may have been shown to be due by that return. Petitioner's return for 1917 is not in evidence, and for aught that appears in the record before us, the tax here involved might have been assessed on the basis of information contained in the return, and would therefore be a tax due under that return. But aside from this possibility, we are clearly of the

opinion that such a narrow construction of the waivers would not be warranted either by the instruments read as a whole or by the statute pursuant to which they were filed. The taxpayer is required to make a return so that the Commissioner may have the information necessary to a correct determination of its tax liability, and if such information be incomplete, the Commissioner must supply the deficiency from other sources. Clearly, it is the entire tax liability to which the inquiry is directed; it is to determine this that the Commissioner accepts the waiver and delays assessment and collection. This broad purpose, implicit in the whole arrangement, is not to be thus restricted by a narrow construction of the phrase "due under any return" in this waiver.

(4) The series of waivers purported to extend the period for the determination, assessment, and collection of the 1917 tax to December 10, 1925, or for the period provided in § 277 (b) of the Revenue Act of 1924. On October 28, 1925, the Commissioner sent his notice of final determination, and on November 18, 1925, petitioner appealed to the Board of Tax Appeals. Since no proceeding to collect these taxes was begun prior to December 10, 1925, the continuance of the right under this waiver depends upon the construction of § 277 (b) and related sections of the 1924 Act and/or § 283 (f) of the 1926 Act. Petitioner asserts that § 277 (b) of the 1924 Act relates only to the right of assessment and not to the right of collection; that because of its reference thereto in the waiver of October 25, 1924, that waiver is similarly limited.

Section 280 provides that if, after June 2, 1924, the Commissioner determines that an assessment of 1917 taxes, "whether as deficiency or as interest, penalty, or other addition to the tax," should be made, the other provisions of the Act of 1924 are applicable. Section 274 (a) provides for the appeal of such determination to the Board of Tax Appeals, and § 277 (b) extends the period during which such assessment may be made until after the final decision of the Board. Thereafter, § 278 (d) allows the Government six years in which to collect the assessment.

In *Russell* v. *United States,* 278 U. S. 181, it was held that the extension granted by § 278 was limited to cases in which the assessment in question had been made after June 2, 1924, the effective date of the 1924 Act. That was a case of a direct proceeding by the United States to collect taxes: it was not a case involving an appeal to the Board of Tax Appeals. The opinion says of the Act of 1924, that

> It made provision for taxes thereafter to accrue; also for those already due. It distinguished between existing assessments and those which were to follow. It established a Board of Tax Appeals and gave the right of appeal thereto whenever thereafter the Commissioner should propose to assess for deficiency. * * * To secure proper action by the Board might require considerable time, and this was provided for by extending the limitation to six years after assessment. But the taxpayer was afforded protection against improper action by the Commissioner through an appeal before any assessment could be actually imposed—a new and valuable right.

If, in the instant case, the definite and final assessment of this deficiency tax was prior to June 2, 1924, then the *Russell case* governs it.

The assessment of March, 1923, was a jeopardy assessment to which petitioner immediately filed a claim in abatement. The final determination of this assessment and its collection would await the Commissioner's action on the claim for abatement, under the common practice (See H. R. Rep. No. 2, 70th Cong., 1st Sess., p. 34; H. R. Doc. No. 578, 69th Cong. 2d Sess., p. 3 et seq., cited in *Regla Coal Co.* v. *Bowers, supra*); that such was petitioner's understanding is shown by its petition to the Board of Tax Appeals in which it states that the deficiency letter of October 28, 1925, "evidences the final determination by the Commissioner of the 1917 deficiency." Had it not been so, petitioner would have had no right of appeal to the Board under §280 of the Act of 1924; this requires a final determination, necessarily prior to final assessment. Cf. *United States* v. *Board of Tax Appeals*, 16 F. (2d) 337. The fact that the amount of the deficiency as finally determined was covered by the jeopardy assessment theretofore made, did not render it any the less a deficiency which the Commissioner on October 28, 1925, finally determined should be assessed. The Commissioner might have abated the former assessment in its entirety (as he did in part) and in the absence of a written settlement have determined a new deficiency assessment at any time before December 10, 1925. See *L. Loewy & Sons, Inc.*, v. *Commissioner*, 31 F. (2d) 652 (C. C. A. 2d); *Holmquist* v. *Blair*, 35 F. (2d) 10 (C. C. A. 8th). And such new determination would clearly

fall within § 280 and § 274 (a). Petitioner availed itself of the provisions of the Act of 1924 for a review of the determination of its tax liability; it can not now deny the applicability of related sections of that act. Accordingly, we conclude that since the deficiency determination of October 28, 1925, came within § 280, and was appealed under § 274 as being a determination before assessment, the extension of time granted by § 277 (b) and § 278 (d) has not expired.

(5) But assuming that the jeopardy assessment of March 5, 1923, was the only assessment, we are of the opinion that the period for collection was extended by § 283 (f) of the Act of 1926. That section specifically provides for a review by the Board of Tax Appeals, if an assessment was made "before June 3, 1924, but was not paid in full before that date, and if the Commissioner after June 2, 1924, but before the enactment of this Act finally determined the amount of the deficiency, and if the person liable for such tax appealed before the enactment of this Act to the Board and the appeal is pending before the Board at the time of the enactment of this Act, the Board shall have jurisdiction of the appeal." Moreover, in such case § 274 (a) provides (with exceptions not material to this discussion) that no distraint or proceeding for the collection of a deficiency shall be begun or prosecuted if a petition has been filed with the Board of Tax Appeals until the decision of the Board has become final. Furthermore, the beginning of such a proceeding or distraint during the time this prohibition is in force may be enjoined, contrary to the general rule. *Peerless Woolen*

Mills v. *Rose,* 28 F. (2d) 661. Section 277 (b) provides that the running of the statute of limitations against the beginning of a proceeding for collection, as well as against the making of assessments, "shall [after the mailing of the necessary notice] be suspended for the period during which the Commissioner is prohibited from making the assessment or beginning distraint, or a proceeding in court and for 60 days thereafter." See also Reg. 69, Art. 1232 and 1271.

Section 283 (1) provides that in the case of any tax imposed by a prior act, the running of the statute shall be considered to have been suspended (in addition to the period of suspension provided in § 277 [b]) for any period prior to the enactment of the Act of 1926 during which the Commissioner was prohibited from making an assessment or beginning distraint or proceeding in court.

In the case at bar the petition to the Board of Tax Appeals was filed on November 18, 1925, before the expiration of the last waiver on December 10, 1925, and thus was pending before the Board on February 26, 1926, the date on which the Act of 1926 became effective. Consequently, § 283 (f) and related sections of that Act are fully applicable.

Petitioner insists, however, that both § 277 (b) and § 283 (f) of the Act of 1926 are limited by § 278 (e) of that Act. The latter section provides that "This section * * * shall not authorize the assessment * * * or collection * * * (1) if at the time of the enactment of this Act [such proceeding] was barred * * * unless prior to the enactment of this Act the Commissioner and the taxpayer agreed in writing thereto, or (2) contrary to the provisions of subdivision (a) of sec-

tion 274 of this Act." The argument is that since the last waiver by its terms expired on December 10, 1925, that is, prior to the effective date of the Act of 1926, this section bars collection. We can not accept this interpretation. The authority for extending the time for collection under the facts of the case at bar is found in § 283 (f), and not in § 278; the prohibition in § 278 (e), however, is by its language clearly limited to assessments and collections authorized by that section, that is, by the preceding alphabetical subdivisions of § 278. Moreover, the latter part of § 278 (e) recognizes and indeed reinforces the prohibition against collection while a case is pending before the Board, contained in § 274 (a). (This § 274 [a] is incorporated by reference in § 283 [f] which authorizes collection in the present case. Cf. § 283 (f) and § 283 [e].) Obviously, then, the provisions of § 278 (e) were not intended to be inconsistent with § 274 (a) or subdivisions (e) and (f) of § 283. If we are to accept petitioner's contention that § 278 (e) is inconsistent with the interpretation we have given § 283 (f), we must necessarily hold that § 278 (e) in effect nullifies the clear provisions of § 283 (f). Not only is there nothing in the statute to warrant this interpretation, but the interrelations of § 274 (e) and § 283 (f) makes the contrary clear.

APPENDIX C

DISCUSSION OF EFFECT OF STATUTES TO EXTEND THE TIME FOR ASSESSMENT AND COLLECTION AFTER DECEMBER 10, 1925

A jeopardy assessment was made on March 5, 1923. (R. 37.) Under the Revenue Act of 1921 then in force, all appeals by taxpayers were to the Commissioner. On March 27, 1923, the petitioner filed a claim for abatement of the jeopardy assessment. (R. 28, 37.) The claim in abatement was allowed in part and rejected in part by the Commissioner and the petitioner was notified of the deficiency in tax finally determined on October 28, 1925. (R. 6, 38.) The Revenue Act of 1924 (enacted June 2, 1924) provided for an appeal to the Board of Tax Appeals. The Board had jurisdiction to hear the appeal in the instant case only because after June 2, 1924, the Commissioner finally determined the deficiency in the tax. See *Appeal of Joseph Garneau Company*, 1 B. T. A. 75; *Roy & Titcomb, Inc.* v. *United States*, 39 F. (2d) 753 (C. Cls.), now pending in this Court on writ of certiorari, No. 412, present term.

As held by the court below, the applicable provisions of the Revenue Act of 1926 extend the time until after the decision by this Court. (R. 48–50; *supra*, Appendix B, pp. 29–31.) By the provisions of the Revenue Act of 1926, Section 283 (f), the jurisdiction of the Board of Tax Appeals in cases of this kind was expressly ratified. That section provided:

> If any deficiency in any * * * tax imposed by the Revenue Act of 1916, the Revenue Act of 1917, * * * was assessed before June 3, 1924, but was not paid in full before that date, and if the Commissioner after June 2, 1924, but before the enactment of this Act finally determined the amount of the deficiency, and if the person liable for such tax appealed before the enactment of this Act to the Board and the appeal is pending before the Board at the time of the enactment of this Act, the Board shall have jurisdiction of the appeal. In all such cases the powers, duties, rights, and privileges of the Commissioner and of the person who has brought the appeal, and the jurisdiction of the Board and of the courts, shall be determined, and the computation of the tax shall be made, in the same manner as provided in subdivision (e) of this section, * * *.

The facts of the instant case come precisely within the provisions of this section.

Section 283 (e) of the Revenue Act of 1926 provides that such a case shall be treated as though a notice had been sent "under subdivision (a) of Section 274 of this Act." The section further provides that in such a case—

> the amount of the tax * * * shall be collected and paid in the same manner and subject to the same provisions and limitations * * * as in the case of a deficiency in the tax imposed by this title, except as otherwise provided in section 277 of this Act and in subdivision (i) of this section.

The effect of this section is to give the same significance to the final determination by the Commissioner of the taxpayer's deficiency in the instant case on October 28, 1925, as though it had

occurred under the provisions of the Revenue Act of 1926.

Section 277 (b) of the Revenue Act of 1926 provides:

> (b) The running of the statute of limitations provided in this section, * * * shall * * * be suspended for the period during which the Commissioner is prohibited from making the assessment or beginning distraint or a proceeding in court, and for 60 days thereafter.

Section 274 (a) of the Revenue Act of 1926 provides:

> (a) If * * * the Commissioner determines that there is a deficiency in respect of the tax imposed by this title, the Commissioner is authorized to send notice of such deficiency to the taxpayer by registered mail. Within 60 days after such notice is mailed * * * the taxpayer may file a petition with the Board of Tax Appeals for a redetermination of the deficiency. * * * no assessment * * * and no distraint or proceeding in court for its collection shall be made, begun, or prosecuted * * * if a petition has been filed with the Board, until the decision of the Board has become final. Notwithstanding the provisions of section 3224 of the Revised Statutes, the making of such assessment or the beginning of such proceeding or distraint during the time *such prohibition* is in force may be enjoined by a proceeding in the proper court. (Italics ours.)

By Sections 277 (b) and 274 (a) of the Revenue Act of 1926 the period for collection is extended upon appeal to the Board of Tax Appeals until after its decision has become final. The Commis-

sioner is expressly prohibited from making collection until that time and any such attempt to enforce collection may be enjoined by appropriate proceedings.

The only manner in which the Commissioner could make collection is provided by Section 283 (i) of the Revenue Act of 1926, which authorizes him to instruct the Collector to collect the tax in any case where the Commissioner believes the collection of the deficiency would be jeopardized by delay. In such case, the Collector must mail to the taxpayer a notice and demand for payment of the tax and within ten days after such jeopardy notice the taxpayer may obtain a stay of collection by filing with the Collector a bond in like manner and under the same conditions as in the case of a bond to stay the collection of a jeopardy assessment.

The provisions of Section 283 (i) are not effective unless and until the Commissioner makes the further determination as to the necessity of a jeopardy collection and directs the notices be given. This further action by the Commissioner was not taken in the instant case. The possibility of a jeopardy collection is limited by the provisions of Section 283 (i). It in no way modifies the applicability of Section 277 (b) to the instant case. The prohibition of collection on the Commissioner in that section is "such prohibition" defined in Section 274 (a), as being the forbiddance of an assessment or collection pending an appeal to the Board of Tax Appeals. Thus, collection may be made after the decision of this Court, for by Section 1005 of the Revenue Act of 1926 the Board's decision will not become final until then.

U. S. GOVERNMENT PRINTING OFFICE: 1930

SUPREME COURT OF THE UNITED STATES.

No. 115.—October Term, 1930.

W. P. Brown & Sons Lumber Co., Petitioner, *vs.* David Burnet, Commissioner of Internal Revenue.	On Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

[January 5, 1931.]

Mr. Justice Brandeis delivered the opinion of the Court.

On April 1, 1918, W. P. Brown & Sons Lumber Company filed its income and profits tax return for the year 1917. The tax thereon was duly paid. On March 6, 1923, the Bureau of Internal Revenue duly mailed to the taxpayer notice of a deficiency. A timely appeal was taken to the Commissioner who had meanwhile, in March, 1923, made a jeopardy assessment. On March 27, 1923, the taxpayer filed a claim for abatement. On June 4, 1924, this claim and the appeal were sent by the Income Tax Unit to the Committee on Appeals and Review.[1] On October 28, 1925, the Commissioner duly mailed to the taxpayer notice of his determination, the claim for abatement being allowed in part and rejected in part. On November 18, 1925, the taxpayer appealed to the Board of Tax Appeals for a redetermination of the deficiency. There the parties stipulated the amount of the additional tax, and submitted the question whether it was barred by the statute of limitations. The Board held that it was not, 13 B. T. A. 1425; and its decision was affirmed by the Circuit Court of Appeals, 38 F. (2d) 425. This Court granted a writ of certiorari, the briefs and arguments to be "limited to the question of the validity and effect of the waivers". 281 U. S. 718.

The jeopardy assessment was clearly made in time. The return was filed April 1, 1918; the assessment was made in March, 1923. By § 250 (d) of the Revenue Act of November 23, 1921, c. 136, 42

[1]See Williamsport Wire Rope Co. v. United States, 277 U. S. 551, 563, note.

Stat. 227, 265, a period of five years from the filing of the return, was allowed for assessment, see *Stange* v. *United States*, No. 23, decided this day. Moreover, while there was under the Act of 1917 a limitation of three years on the period for assessment,[2] the taxpayer had duly executed and filed on December 13, 1920, before the three years expired, a waiver which extended the period for assessment to April 1, 1924.[3] This waiver was valid even though executed by the taxpayer before the Act of 1921 and not executed by the Commissioner until 1922. *Aiken* v. *Burnet*, No. 69, decided this day. The original letter advising the taxpayer of the deficiency, the intradepartmental appeal therefrom, the jeopardy assessment, and the claim for abatement were all made in 1923 within the extended period.

The sole question for discussion is whether the right of collection has been barred under § 250 (d) of the Revenue Act of 1921 which imposed a five year limitation on collection. See *Stange* v. *United States*, *supra*. No payment has been made on account of the additional tax; and no proceeding for collection has been taken, either by suit or by distraint. Unless extended by waiver, the period allowed for collection expired April 1, 1923. Three waivers were given. The first was executed by the taxpayer and filed with the Bureau December 13, 1920; was approved by the Commissioner on December 2, 1922; and expired April 1, 1924. The second was executed by both the taxpayer and the Commissioner on December 10, 1923, and expired by its terms one year from its date. The

[2]There was doubt whether the 1916 and 1917 Acts required the Commissioner both to discover the error in the return and to make an additional assessment, or merely to make discovery, within three years. Revenue Act of 1916, c. 463, § 14 (a), 39 Stat. 756, 772, incorporated by reference into Revenue Act of 1917, c. 63, § 206 (c), 40 Stat. 300, 305. At that time, the Commissioner thought it sufficient that he discover the error within the three years. See Reg. 33 (Rev. ed. 1918) Art. 233. Compare Elliot National Bank *v.* Gill, 218 Fed. 600, 602; United States *v.* Nashville, C. & St. L. Ry., 249 Fed. 678, 682; Du Pont *v.* Graham, 283 Fed. 300, 302, reversed on other grounds, 262 U. S. 234. Section 250 (d) of the 1921 Act extended this period for assessment to five years, (compare United States *v.* Chicago & E. I. Ry., 298 Fed. 779), but provided that the time run from the filing of the return.

[3]This waiver was unlimited in time but expired April 1, 1924, under a departmental ruling promulgated April 11, 1923, Mim. 3085, I. R. Cum. Bull. II-1, p. 174. See Aiken *v.* United States, No. 69, decided this day, note 1.

third was executed by the taxpayer and the Commissioner on October 25, 1924; and it was in terms declared to be "in effect for a period of one year after the expiration of the statutory period of limitation within which assessments of taxes may be made for the year or years mentioned, or the statutory period of limitations as extended by Section 277 (b) of the Revenue Act of 1924, or by any waivers already on file with the Bureau." All three waivers were effective in extending the period for collection. The first was valid although executed by the taxpayer before the Act of 1921 and not executed by the Commissioner until 1922, and operative even though it did not make express reference to collection. *Aiken* v. *Burnet*, No. 69, decided this day. The second was valid because given within the period as extended by the first. The third was valid because given within the period as extended by the second. Moreover, both were valid although given after five years from the date of the filing of the return.[4] See *Stange* v. *United States*, No. 23; *Burnet* v. *Chicago Railway Equipment Co.*, No. 231, both decided this day. In terms, both covered collection. The third had not expired when the appeal was taken to the Board of Tax Appeals on November 18, 1925.

Whether the right of collection became barred thereafter depends upon the construction to be given to the applicable statutes. The taxpayer contends that the right of collection was barred on December 10, 1925, that is twenty-two days after the appeal to the Board of Tax Appeals had been taken, although this appeal was then pending without having been heard, and indeed could not have been heard under the practice of the Board. See Rule 15, 1 B. T. A. 1289; Rules 24-25, 7 B. T. A. 1361-62. Besides the Act of 1921, provisions of the Revenue Act of 1924 and of the Revenue Act of 1926 are relied upon. The argument is that despite the appeal to the Board, the Commissioner was at all times at liberty to enforce payment of the tax as assessed by the jeopardy assessment or as later reduced; that hence, collection was barred on December 10, 1925, by § 250 (d) of the 1921 Act; and that there was nothing in either the Revenue Act of June 2, 1924, c. 234, 43 St. 253 or the Revenue Act of February 26, 1926, c. 27, 44 Stat. 9, which kept

[4]Inasmuch as the second and third waivers were in themselves sufficient to extend the period for collection, the first waiver may be disregarded in this connection, as was done by the lower court. See 38 F. (2d) 428.

alive the right of collection. The Board of Tax Appeals rested its decision on provisions of the 1924 Act;[5] the Circuit Court of Appeals on those and also on the 1926 Act. Only the latter act need be considered.

Section 283 (f) of the Revenue Act of 1926, 44 Stat. 64, provided:

"If any deficiency [in any 1916-21 income or profits taxes] . . . was assessed before June 3, 1924, but was not paid in full before that date, and if the Commissioner after June 2, 1924, but before the enactment of this Act finally determined the amount of the deficiency, and if the person liable for such tax appealed before the enactment of this Act to the Board and the appeal is pending before the Board at the time of the enactment of this Act, the Board shall have jurisdiction of the appeal. In all such cases the powers, duties, rights, and privileges of the Commissioner and of the person who has brought the appeal, and the jurisdiction of the Board and of the courts, shall be determined . . . in the same manner as provided in subdivision (e) of this section . . . ."[6]

This section is applicable to the case at bar. The deficiency was assessed in March, 1923; and hence before "June 3, 1924," "and was not paid." On October 28, 1925, between the effective dates of the 1924 and the 1926 Acts, the Commissioner finally determined the amount of the deficiency; and on November 18, 1925, also prior to the enactment of the 1926 Act, the taxpayer appealed to the Board of Tax Appeals. One effect of the section was to confirm the jurisdiction of the Board.[7] Another effect was to make ap-

[5]It relied upon G. L. Ramsey v. Commissioner, 11 B. T. A. 345, where it had held that on a jeopardy assessment which had been made within the five year period as extended by a valid waiver, the Commissioner had, under § 278 (d) of the Revenue Act of 1924, six years after the assessment within which to commence proceedings for collection, even though the parties had agreed in the waiver for a different period for collection. The Board held further that there was nothing in § 278 (d) of the Revenue Act of 1926 which restricted this period to that mentioned in the waiver.

[6]Somewhat similar provisions relating to like cases under prior estate and gift tax statutes were enacted at the same time. See Revenue Act of 1926, c. 27, §§ 318, (d), (e), and (f), 44 Stat. 9, 82-83; De Sabichi *v.* Commissioner, 4 B. T. A. 445.

[7]Although some doubt was expressed in Appeal of Reynolds & Reynolds Co., 1 B. T. A. 275, the Board of Tax Appeals very early took jurisdiction in these cases. Appeal of Joseph Garneau Co., Inc., 1 B. T. A. 75; Appeal of Ormsby McKnight Mitchell, 1 B. T. A. 143; Appeal of Boston Structural Steel Co., 1 B. T. A. 602; Appeal of Buffalo Slag Co., 1 B. T. A. 749. Compare Appeal of Terminal Wine Co., 1 B. T. A. 697. Following the Act

plicable to the case at bar § 274 (a) and § 277 (b) of the 1926 Act.[8] Section 274 (a) provided that no distraint or proceeding in court for the collection of the deficiency "shall be made, begun, or prosecuted . . . if a petition has been filed with the Board [of Tax Appeals], until the decision of the Board has become final."[9] And § 277 (b) provided that the running of the statute of limitations on "the beginning of distraint or a proceeding in court for collection, in respect of any deficiency shall . . . be suspended for the

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of 1926, the Board has uniformly held that § 283(f) confirmed its jurisdiction. See Appeal of Covert Gear Co., 4 B. T. A. 1025; Appeal of Elizabeth W. Stranahan, 4 B. T. A. 1141; Appeal of Nice Ball Bearing Co., 5 B. T. A. 484; Appeal of Slater Mills, Inc., 5 B. T. A. 971; Appeal of Ocean Accident & Guarantee Corp., 6 B. T. A. 1045;; Reliance Mfg. Co. *v.* Commissioner, 7 B. T. A. 583. Such was clearly the legislative purpose of the section. See Hearings Before the Committee on Ways and Means on Revenue Revision of 1925, 69th Cong., 1st Sess., pp. 898, *et seq.*, particularly the statement of the Board Chairman, Charles D. Hamel, p. 923; H. Rep. No. 1, *id.*, December 7, 1925, p. 13; Sen. Rep. No. 52, *id.*, January 16, 1926, p. 32; Conference Report, H. Rep. No. 356, *id.*, February 22, 1926, pp. 46-47.

[8]Subdivision (f) of § 283 refers to subdivision (e). That section provides that the situation dealt with therein should be treated as though a deficiency notice had been sent under § 274 (a), and that the tax "shall be collected and paid in the same manner and subject to the same provisions and limitations . . . as in the case of a deficiency imposed [by the 1926 Act], except as otherwise provided in section 277", and in certain sections relating to interest and jeopardy collection, which are here immaterial. 44 Stat. 64. Deficiencies under the 1926 Act were governed by §§ 273, 274, and 275, 44 Stat. 55-57. Section 273, defining the term, and § 275, providing for additions in the case of negligence, fraud, etc., are not here applicable. Section 274 (a) is quoted in the text. Section 277 (a) related to the periods for assessment and collection generally and reënacted the five year limitation on the collection of 1917 taxes. It was qualified by § 277 (b), quoted in the text.

Section 283 (f) was, in addition, limited by § 283 (j) which prohibited an appeal to the Circuit Court of Appeals if the hearing before the Board had been held prior to the enactment of the 1926 Act. Blair *v.* Curran, 24 F. (2d) 390; Blair *v.* Hendricks, 24 F. (2d) 819; Power & Bro. *v.* Commissioner, 27 F. (2d) 116. In the case at bar, the hearing was held on April 26, 1928. Also, § 284 (d), 44 Stat. 67, which imposed restrictions on the allowance of refunds and credits after an appeal had been taken to the Board of Tax Appeals, was made inapplicable to cases under § 283 (f). Compare Burnet *v.* Chicago Railway Equipment Co., No. 231, decided this day, note 8.

[9]44 Stat. 55. Notwithstanding the prohibition in R. S. 3224, such suit or distraint proceeding may, by express provision in § 274 (a), be enjoined. Peerless Woolen Mills *v.* Rose, 28 F. (2d) 661.

period during which the Commissioner is prohibited from . . . beginning distraint or a proceeding in court, and for 60 days thereafter."[10] That period still continues as there is not yet a final determination of the Board.[11] The taxpayer concedes that § 283 (f) of the 1926 Act confirmed the jurisdiction of the Board of Tax Appeals in the present case, but contends that it did not operate to extend the period for collection until after a final determination.

First. It is argued that § 283 (f) cannot be interpreted as extending the time for the collection of the tax because of § 1000.[12] The latter section amended the 1924 Act by providing that where the Board found that the tax was barred by the statute of limitations, its decision should be that there was no deficiency. This section was inserted to confirm the jurisdiction of the Board in making final disposition of a deficiency already barred.[13] It contains nothing which affects the special jurisdiction conferred by § 283 (f).

Second. It is argued that neither § 277 (b), which suspended the running of the statute, nor § 283 (f), which incorporated the former,[14] indicate that § 277 (b) was to be given a retroactive effect. The argument is unsound. Subdivision (f) of § 283 shows that it was the intention of Congress to apply the provisions of § 277 (b) to cases like that at bar. Since in such cases the assessment (before June 3, 1924), the final determination and the appeal to the Board (after June 2, 1924), must expressly have occurred prior to the enactment of the 1926 Act, the reference to

[10]44 Stat. 58-59.

[11]Section 274 (h), 44 Stat. 56, provided that the decision of the Board should become final according to the rules set out in § 1005. That section provides that finality shall be given thirty days after the issuance of the mandate of this Court, in case of an affirmance or dismissal, or upon correction in case of a modification or reversal. 44 Stat. 111; 26 U. S. C., § 1228.

[12]44 Stat. 105, 107. This section was a general amendment to Title IX of the Revenue Act of 1924. An entire new section, § 906, was, *inter alia*, thereby added to the 1924 Act, of which subdivision (e) is relied upon by respondent.

[13]See Hearings Before Committee on Ways and Means on Revenue Revision of 1925, *supra*, note 7, pp. 849, *et seq.*, 900-02. The Board had early decided that it had jurisdiction in such cases under § 900 of the 1924 Act. Appeal of National Refining Co., 1 B. T. A. 236. Compare note 12, *supra*.

[14]See note 8, *supra*.

§ 277 (b) contained in § 283 (f) necessarily meant that in these cases the former section was to be applied retroactively.

Third. The taxpayer relies also upon § 278 (e)[15] of the 1926 Act which prohibited collection, in the absence of a waiver prior to that Act, if at the date of its enactment the tax was already barred. The argument is that since the last waiver by its terms expired on December 10, 1925, that is, prior to the effective date of the 1926 Act, this section bars collection. That interpretation is not correct. As was said by the court below: "The authority for extending the time for collection under the facts of the case at bar is found in § 283 (f), and not in § 278. . . . If we are to accept petitioner's contention that § 278 (e) is inconsistent with the interpretation we have given § 283 (f), we must necessarily hold that § 278 (e) in effect nullifies the clear provisions of § 283 (f). Not only is there nothing in the statute to warrant this interpretation, but the interrelation of § 278 (e) and § 283 (f) makes the contrary clear."[16] 38 F. (2d) 431.

Fourth. It is argued that inasmuch as the Commissioner was not prohibited from making collection between November 18, 1925, the date of the appeal, and February 26, 1926, the effective date of the 1926 Act,[17] and since the period for collection, as extended by

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[15] "This section . . . shall [not] authorize . . . the collection [of a tax] (1) if at the time of the enactment of this Act [such collection] was barred . . . unless prior to the enactment of this Act the Commissioner and the taxpayer agreed in writing thereto, or (2) contrary to the provisions of subdivision (a) of section 274 of this Act." 44 Stat. 59.

[16] As was pointed out below, the latter part of § 278 (e), which prohibits collection contrary to § 274 (a), quoted *supra* p. 5, recognizes and reinforces the prohibition against collection while a case is pending before the Board. See note 9, *supra*. Since this same subsection 274 (a) is incorporated in § 283 (f), *supra* note 8, it seems clear from this interrelation that § 278 (e) was not intended to limit § 283 (f), and that the suspension of the statute given by § 277 (b) is applicable to the instant case. See 38 F. (2d) 431.

[17] The filing of the claim for abatement of the jeopardy assessment did not operate as a stay of collection. The claim filed in the present case, under § 252 of the 1921 Act (42 Stat. 268) and R. S. 3228 as amended by § 1316 of that Act (42 Stat. 314), was apparently not accompanied by a bond. Under such circumstances the filing of the claim would not have prevented collection if the Commissioner had believed that collection of the tax was jeopardized. See Reg. 33 (1918 ed.), Art. 261; Reg. 45, Art. 1032; Reg. 62, Art. 1032; *cf.* United States v. Burden, Smith & Co., 33 F. (2d) 229, 230. Prior to the decision in Bowers v. N. Y. & Albany Lighterage Co., 273 U. S. 346, it was,

the waivers, expired December 10, 1925, § 277 (b) does not aid the Commissioner because the statute had run before that section could cause it to be suspended. Attention is called to another section of the 1926 Act, § 283 (l), which provided that in the case of any tax imposed by a prior Act there shall be added to the period of suspension given by § 277 (b), any period prior to the Act of 1926 during which the Commissioner was prohibited from beginning distraint or proceeding in court.[18] The argument is that this section indicates that § 274 (a) and § 277 (b) are not to be applied retroactively; that only the period, if any, obtained under § 283 (l) can be added to the waivers; and that since the Commissioner was not prohibited from collecting prior to the expiration of the last waiver, § 283 (l) is inapplicable. Section 283 (l) expressly provides that the time therein granted shall be "in addition to the period of suspension provided for in subdivision (b) of section 277." It undoubtedly had reference to those cases in which a claim for abatement, accompanied by a bond, had been filed and collection stayed between the 1924 Act and 1926 Act.[19] It cannot limit the application to the case at bar of § 274 (a) and § 277 (b), as § 283 (f) directs. This argument of the taxpayer is also unsound.

Affirmed.

A true copy.

Test:

Clerk, Supreme Court, U. S.

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however, the common practice to postpone collection upon the filing of a claim for abatement if there was no doubt as to the taxpayer's solvency. See H. Rep. No. 2, 70th Cong., 1st Sess., December 7, 1927, p. 34.

[18]44 Stat. 66.

[19]See § 279 of the Revenue Act of 1924, c. 234, 43 Stat. 253, 300. Compare § 283 (b) and (c) of the 1926 Act. These sections confirmed the jurisdiction of the Board in cases in which an assessment had been made and an appeal taken, or in which the 60-day period had not expired before the 1926 Act. Compare Plains Buying & Selling Ass'n v. Commissioner, 5 B. T. A. 1147, 1153. In such cases a jeopardy assessment and claim for abatement, accompanied by a bond and providing for a stay of collection, between the 1924 and 1926 Act, would have been possible, and § 283 (l) would have applied.